The ANTITRUST BULLETIN

In This Issue

SYMPOSIUM

SOME ASPECTS OF PRIVATE TREBLE DAMAGE ACTIONS

sponsored by

Antitrust Section of the Illinois State Bar Association

- Robert A. Bicks
- Miles G. Seeley
- Lee Loevinger
- E. T. Grether
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PART I

Symposium

SOME ASPECTS OF PRIVATE TREBLE DAMAGE ACTIONS

sponsored by

THE ANTITRUST SECTION

of the

ILLINOIS STATE BAR ASSOCIATION

Chicago, Illinois

November 6, 1958

THE DEPARTMENT OF JUSTICE AND PRIVATE TREBLE DAMAGE ACTIONS

by

ROBERT A. BICKS*

Helpful at the outset is a thumbnail of the role Congress intended for private suits as an aid to antitrust enforcement. The private cause of action "was intended not merely to redress injury to an individual . . . but to aid in achieving the broad social object [of the antitrust statutes]." [1] More specifically, treble damage provisions were designed to "supply an ancillary force of private investigators to supplement the Department of Justice in law enforcement." [2]

Against that background, treated initially is the recent spurt in private treble damage suits. Relevant next is the role the Department plays in such private litigation. Finally, I raise briefly the question of whether discretionary trebling of damages might increase effectiveness of the private suit as a means of antitrust enforcement.

I. *History of Private Antitrust Enforcement*

Only in recent years has private antitrust enforcement come of age. Despite the assurance of trebled damages, the private antitrust suit was long dormant. By 1940, a half century of private action yielded only 175 reported cases—with judgment for plaintiff in only 13.[3] After World War II, however, "the private antitrust claimant emerged from obscurity. Reported recoveries from 1945 to 1951 amounted to 1½ times the number compiled during the

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Editor's Note: Due to the length of this Symposium, Part II of "The Effect of Foreign Antitrust Laws on United States Business" by E. Ernest Goldstein, will appear in the next issue of the Antitrust Bulletin.

1 *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358, 365 (9th Cir. 1955).

2 *Quemos Theatre Co., Inc.* v. *Warner Bros.*, 35 F. Supp. 949, 950 (D. N. J. 1940). See also *Maltz* v. *Sax*, 134 F. 2d 2, 4 (7th Cir. 1943), *cert. denied*, 319 U. S. 772, 63 Sup. Ct. 1437 (1943); *Weinberg* v. *Sinclair Refining Co.*, 48 F. Supp. 203, 205 (E. D. N. Y. 1942).

3 Comment, 18 *Univ. of Chi. L. Rev.* 130, 138 (1950).

entire previous history of antitrust litigation."[4] In 1952, 212 private suits were filed and 187 were concluded.[5] Finally, the average number of suits filed each year for the last three years has been in excess of 200.[6]

This private enforcement spurt, however, rests largely on previous government action. Many writers have assumed that the primary function of private suit would be to explore new fields of law and to uncover new violations. With some notable exceptions—*Toolson*,[7] *Apex Hosiery*[8] and *Mandeville*,[9] such has not been the case. The Clayton Act Section 5,[10] which Mr. Seeley will discuss in detail,

[4] Comment, Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit, 61 *Yale L. J.* 1010, Appendix II, 1064 (1952).

[5] The following information was compiled by the staff of the Antitrust Division:

PRIVATE LITIGATION 1948-1957

Fiscal Years	*Number of Suits Commenced*	*Number Disposed of*	*Number Disposed of by Consent Before, During & After Trial but before Final Judgment*
1948	78	45	27
1949	162	80	56
1950	157	102	61
1951	209	114	73
1952	261	152	104
1953	212	187	117
1954	163	147	102
1955	209	200	144
1956	227	212	153
1957	188	192	127
1958	NOT AVAILABLE		
TOTAL 10-YEAR PERIOD 1948-57	1,866	1,431	964

[6] *Ibid.*

[7] *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356, 74 Sup. Ct. (1953).

[8] *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 60 Sup. Ct. 982 (1940).

[9] *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 68 Sup. Ct. 1343 (1948).

[10] 38 Stat. 731, 15 U. S. C. §16.

permits private suitors to introduce final judgments rendered after testimony in government actions against the same defendants as prima facie evidence of all issues determined in the government suit. Further, prior consent decrees, though unqualified under Clayton Act Section 5, may nonetheless come in through the back door of judicial notice. In *Milgram* v. *Lowe's,*[11] for example, the Third Circuit commented that previous litigation, in which a consent decree was entered into by the defendants, indicated their "proclivity" to violate the antitrust laws.[12] In like fashion, the Second Circuit allowed a plea of *nolo contendere* to be introduced for impeachment purposes.[13] Finally, even where prior government judgments are for no purposes admissible, former enforcement proceedings may lighten private plaintiffs' burden by settling difficult questions of law, spotlighting violations as well as valuable sources of information, and schooling subsequent litigants in tested pleading and trial techniques.

For these reasons, perhaps, a survey made in 1952 indicated that "all of the movie litigation and approximately two-thirds of other private suits followed successful government antitrust proceedings." [14] At that time the movie cases comprised over 25% of total private suits[15] which meant that approximately 90% of the private suits followed government action. This percentage has declined somewhat since 1952, however, it is estimated that 76 to 78% of the suits filed still follow in the wake of successful government suits.

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11 192 F. 2d 579 (3rd Cir. 1951).

12 "The past proclivity of these defendants to unlawful conduct," that court observed, "may be of some significance here. . . . Viewing the facts of this case in the light of the specific finding in the *Paramount* case, the inference of conspiracy here is strengthened." *Id.* at 584. The decree had apparently been excluded by the district court. See *id.* at 593, n. 5. For other judicial references to Paramount's "proclivity" to violate, see *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 190 F. 2d 951, 958 (2d Cir. 1951); *Benal Theatre Corp.* v. *Paramount Pictures, Inc.*, 9 F. R. D. 726, 735 (N. D. Ill. 1949). But see *Sager Glove Corp.* v. *Bausch & Lomb Optical Co.*, 149 F. 2d 1-4 (7th Cir. 1945) (striking reference to irrelevant government action from complaint); *Revere Camera Co.* v. *Eastman Kodak Co.*, 81 F. Supp. 325 (N. D. Ill. 1948) (same).

13 *Pfotzer* v. *Aqua Systems, Inc.*, 162 F. 2d 799 (2d Cir. 1947).

14 Comment, *supra*, 61 *Yale L. J.* 1010, 1060.

15 *Id.* Appendix I, p. 1063; see also *Hearings before the Subcommittee on Study of Monopoly Power of the House Judiciary Committee on H. R. 7905,* 81st Cong. 2d Sess. 109-11, n. 202 (1950).

Private actions, however, do more than duplicate government work. They may adjudicate practices not expressly covered by government decrees. Or they may help close the breach left by necessarily incomplete government policing of decrees. And most important, private recoveries heighten the financial impact and consequently the deterrent value of both civil and criminal government actions. In addition, the threat of subsequent private litigation may well be a major consideration prompting defendants to enter into consent decrees.[16]

The enforcement value of the private suit cannot be overemphasized. Underscoring private suits' deterrent value is the size of treble damage assessments. A recent judgment for $852,074 is an example;[17] many have passed the $1,000,000 mark.[18] These recoveries, however large, only partially sketch the impact of private suits. First, private suits cost to defend. The survey of defense counsel indicates that in "cases where more than $150,000 is claimed as damages, probably representing over one-half the total private suits, . . . average costs per firm range from $17,000 to $250,000 . . ." [19] Second, beyond these litigation burdens, numerous private actions are settled before trial and, indeed, even before complaint. Thus one estimate based on "correspondence from nineteen law firms litigating private antitrust suits" suggests that "exclusive of movie litigation, 25% of all actions filed are eventually settled out of court." [20] And this, of course, does not include the apparently numerous cases in which parties *threatening* private antitrust action have secured—

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16 The presumptions of the Clayton Act, Section 5 specifically do not apply to consent judgments or decrees entered before any testimony has been taken. 38 Stat. 731, 15 U. S. C. §16.

17 *Noerr Motor Freight Inc.* v. *Eastern Railroad Presidents Conference* (E. D. Pa. 1958), 1958 Trade Cas. Par. 69,085 ($652,074 damages—$299,000 attorney fees).

18 See e.g., *Kiefer-Stewart* v. *Seagram & Sons,* 340 U. S. 211, 71 Sup. Ct. 259 (1951) ($975,000 damages; $50,000 attorney fees); *Brookside Theatre Corp.* v. *Twentieth Century-Fox Film Corp.*, 193 F. 2d 896 (8th Cir. 1952) ($1,125,000 damages; $100,000 attorney fees); *Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F. 2d 561 (7th Cir. 1951) ($941,514 damages; $75,000 attorney fees); *Sager Glove Corp.* v. *Bausch & Lomb Optical Co.*, 1950-51 Trade Cas. Par. 62,956 (N. D. Ill. 1951) ($975,000 damages; $132,000 attorney fees).

19 Comment, *supra,* 61 *Yale L. J.* 1010, 1060.

20 *Id.*, at 1059.

before complaint—desired modification of conduct or financial redress.[21]

II. *The Department's Role*

In addition to the aid given private plaintiffs by government judgments, the Department of Justice affects private litigation in three ways—by intervention, by supplying private litigants with information and finally, by consideration, whenever possible, of views of knowledgeable parties in the negotiation of consent decrees.

Government intervention in private suits is comparatively rare.[22] We do feel an obligation to contribute to the development of the law not only as it may affect government litigation but also as it may affect what we consider to be the congressional purpose in the enactment of private damage provisions. Our action, however, is necessarily limited to those cases presenting a question of law that is either important to government litigation or one that is of widespread significance in the area of private antitrust litigation. As the cases indicate, such intervention does not usually occur until the case is before the Supreme Court,[23] after the controlling issues of law have been well defined. Even then our efforts are directed solely to the issue of law and not to the general merits of the plaintiff's claim. In the recent *Eagle Lion* case,[24] for example, the gov-

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21 *Id.*, at 1060.

22 Treble damage cases in which the government filed *amicus* briefs (from 333 U. S. Oct. 1947 Term to Present):

(1) *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc., et al.*, 340 U. S. 211 (1951);

(2) *Emich Motors Corp.* v. *General Motors Corp., et al.*, 340 U. S. 558 (1951);

(3) *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384;

(4) *Radovich* v. *National Football League*, 352 U. S. 445 (1957);

(5) *Eagle Lion Studios, Inc.* v. *Loew's Inc.*, No. 17, October Term, 1958.

The government also filed *amicus* briefs in support of the following petitions for certiorari, which were denied:

(1) *Williams* v. *Hughes Tool Co.*, 341 U. S. 903 (1951);

(2) *Dipson Theatres* v. *Buffalo Theatres*, 342 U. S. 926 (1952).

In *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, the government also filed a memorandum supporting certiorari. Certiorari was granted on October 13, 1958, and the government presumably will file an *amicus* brief.

23 *Ibid.*

24 *Eagle Lion Studios, Inc.* v. *Loew's Inc., supra*, note 5.

ernment challenged the Second Circuit's construction and application of the *Paramount*[25] judgment. Its brief, however, was carefully written to make it clear that no position was taken on such matters as whether the plaintiff was, in fact, injured. These considerations lead to the conclusion that intervention is probably even less significant, in terms of benefit to the private litigant, than the limited number of cases would indicate.

Apart from intervention, the government may be a source of information even short of trial. The three principal sources of this information are depositions, documents produced pursuant to Rule 34,[26] and interrogatories. The law is clear that information contained in depositions must be made freely available to members of the public.

The Publicity in Taking Evidence Act[27] apparently gives the right to a private person to examine depositions even though that person was not present when the depositions were taken. Since the public cannot be barred from a deposition's taking, access to available copies would seem to follow.

The rule as to documents and interrogatories, however, is not at all clear. In the recent *United Fruit* case[28] the Court refused to extend the principles underlying the Publicity in Taking Evidence Act to documents and interrogatories. After a decree was entered, the Court issued a permanent order that access to documents and interrogatories would be permitted only after it granted permission. The government argued that such an order would be an unwarranted limitation upon its use of such information in attempting to enforce the antitrust laws. This is the first time the Publicity in Taking Evidence Act has been so interpreted. Hard to gauge is the practical impact of the decision, however, since no actual or would-be plaintiff has yet petitioned the Court for permission to see the documents.

Finally, private parties can be benefited in negotiation of consent decrees. There are few times when government counsel is as familiar with the facts of an industry as is the defense counsel. This obvious

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25 *United States* v. *Paramount Pictures, Inc.*, 85 F. Supp. 881 (S. D. N. Y. 1949) aff'd 339 U. S. 974, 70 Sup. Ct. 1032 (1950).

26 Fed. Rules Civ. Proc. Rule 34, 28 U. S. C.

27 37 Stat. 731, 15 U. S. C. §30.

28 *United States* v. *United Fruit Co.*, Civil No. 4560, E. D. La. 1958.

disadvantage is minimized when an informed plaintiff's counsel presents his views and suggestions for relief. Such a procedure does not promote immediate financial gain for the private plaintiff; however, it may pave the way for more effective economic relief in the future.

III. *Mandatory* v. *Discretionary Trebling of Damages*

Despite these aids, a survey of all the antitrust litigation instituted in recent years indicates that the private treble damage suit has been, by far, the least successful. During the period from 1952 to date, private plaintiffs, in treble damage suits, have won 20 cases and lost 124 which amounts roughly to a 6 to 1 ratio in favor of defendants.[29] Seventy-two of these defeats were on motion and the

[29] The following is the outcome of decisions in 251 private antitrust actions reported 1952-1954, 1955, 1956, 1957, 1958, compiled from CCH Trade Cases, 1954, 1955-1958:

FINAL ADJUDICATIONS (BOTH TRIAL AND APPELLATE LEVELS)

	Suits for Damages			
	Decision for Plaintiff		*Decision for Defendant*	
Years Calendar	*After Trial*	*Summary Judgment*	*After Trial*	*On Motion*
1952-54	8	0	8	15
1955	4	1	9	12
1956	1	0	5	20
1957	2	0	10	17
1958 to Date	4	0	11	8
Totals	19	1	43	72
	(20)		(115)	

	Suits for Injunctions			
	Decision for Plaintiff		*Decision for Defendant*	
Calendar Years	*After Trial*	*Summary Judgment*	*After Trial*	*On Motion*
1952-54	4	1	1	4
1955	0	0	0	1
1956	0	0	0	0
1957	1	0	1	0
1958 to Date	2	0	2	0
Totals	7	1	4	5
	(8)		(9)	

remaining 43 were after trial.[30] In private suits for injunctive relief only, during the same period, there were 8 victories as opposed to 9 losses or almost an even split.[31] Turning to trials by the government, the record for the period from 1953 to date stands at 31 victories and 39 defeats which is roughly a 60-40 ratio.[32]

The private treble damage plaintiff's lack of success is even more striking than the statistics indicate. Remember that at least three-quarters of all private treble damage suits follow a path already worn smooth by government victories.[33] Also, when comparing the success of the private litigant with that of the government it must be remembered that over 80% of the cases instituted by the government are settled, many favorably to the government.[34] The cases settled are usually those in which the government's position is the strongest; it is generally those cases where chances of success are leanest that eventually go to trial. Furthermore, of the 70 cases brought by the government, 27 were criminal cases in which the burden of proof was greater than in the normal civil suit.[35] Consider

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30 *Ibid.*

31 *Ibid.*

32 The government's litigation record is as follows:

Calendar Years	*Civil Actions*	*Criminal Actions*	*Total*	*Won*	*Lost*
1953	6	3	9	5	4
1954	11	1	12	6	6
1955	3	4	7	3	4
1956	13	4	17	5	12
1957	5	7	12	6	6
1958	4	8	12	5	7
TOTAL				31	39

These figures are artificial in the sense that they reflect as a loss a multiple defendant case in which all but one are convicted or in which all but one enter *nolo contendere* pleas or consent to judgments before trial. This was done to avoid any possibility of overstatement in the comparison of the government record with private treble damage success.

33 See p. 4, *supra.*

34 See Stedman, *Antitrust Administration and Enforcement,* 50 Northwestern U. L. R. 316, 322 (1953).

35 See note 30, *supra.*

also the fact that the private plaintiff is almost three times as successful where the sole relief sought is an injunction. A possible conclusion, therefore, might be that the treble damage suit is unpopular with both judges and jurors.

One possible reason may be mandatory trebling of damages. As the law is written now, the private plaintiff must seek the full measure of treble damages. It may well be that the past low percentage of private plaintiff's verdicts is due, at least in part, to Courts' and jurors' inclinations to award no recovery at all when faced with the sometimes harsh alternative of penalizing unwitting violators with treble damages. There are, of course, many other possible explanations, all equally incapable of conclusive demonstration This possibility, however, seems worthy of exploration.

Jurors know that damages must be trebled or, at least, defendants have the opportunity to call it to their attention. In *Bordonaro Bros. Theatres, Inc.* v. *Paramount Pictures, Inc.*,[36] the Second Circuit held not error reference by both the Court and defense counsel, made to the jury, that any damages assessed against the defendant would be trebled. Defense counsel's exact language was, "He wants what he can claim as damages, multiplied by three, unearned money." [37] As in the *Bordonaro* case, so in the *Cranberry Co-op.*[38] decision, the court sent the treble-damage complaint to the jury.

The seeming paradox that the treble damage provisions might impair private litigation is firmly rooted in enforcement realities. Available to the Antitrust Division under the Sherman Act, recall, is the choice of civil or criminal proceeding. Sometimes crucial in choosing between the two is some judgment as to the willfulness of violation charged. Thus, in some instances available criminal sanctions are forsaken when the consequences challenged are unintended or the acts involved not clearly illegal. This enforcement decision, it seems clear, may be dictated not only by fairness to potential defendants, but also by the practical enforcement judgment that one who seeks too much of a Court or jury may well end up with nothing. No such choice is available to the private plaintiff. He must

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36 203 F. 2d 676 (2nd Cir. 1953).

37 *Id.* at p. 679.

38 *Cape Cod Food Products* v. *National Cranberry Ass'n*, 119 F. Supp. 900 (D. Mass. 1954).

ask for treble damages or nothing—at least if his attorney is to get his fee from defendants.

The effectiveness of the private suit, as a weapon of antitrust enforcement, depends, as much on the number of suits successful at all as on huge recoveries. On the one hand, evidence of giant damage recoveries, as well as testimony of defense counsel, underscore private suits' deterrent role. As one defense counsel put it, "We find that the threat of treble damage suits, even more than the possibility of government action, deters businessmen from carrying out the proposed acts or practices. It is our estimate that for every act or practice which results in an actual treble damage claim there are hundreds of others which were once considered for action by businessmen and were rejected by them because of the fear of treble damage claims." [39] On the other hand, however large some recoveries, a low percentage of private complaints inspire any redress whatever.

The high risk of loss added to the tremendous financial burden of bringing an antitrust action may well deter deserving plaintiffs from suit. Including the 25% of suits in which plaintiffs receive some recovery by settlement, the private plaintiff's chance of success is about 3 in 10. Against such odds, his attorney's fees alone may be prohibitive. A survey from 1946 to 1952 showed that in no reported instance were fees below $19,000.[40] Many approach the $100,000 mark.[41] These expenses can be recovered only if there is some measure of damages awarded to the plaintiff.[42]

At the same time, it is not at all clear that mandatory treble damages are crucial to encourage private suits. In all probability, the postwar increase in private damage actions stemmed, not primarily from any mandatory treble damage requirement, but rather from the quickened pace of government enforcement. Expanded antitrust coverage, the development of *per se* doctrines, and—perhaps most important—loosened requirements for proof of damages have

[39] Comment, *supra*, 61 *Yale L. J.* 1010, 1061, n. 334.

[40] Comment, *supra*, 61 *Yale L. J.* 1010, 1060.

[41] See note 17 *supra*.

[42] *Alden-Rochelle, Inc.* v. *American Society of Composers, Authors and Publishers*, 80 F. Supp. 888 (S. D. N. Y. 1948).

increased incentive to sue. Likewise, by increasing the likelihood of damage verdicts, and thus fee assessments against possibly lucrative defendants, lawyers may be further encouraged to undertake private antitrust litigation.

A thesis that the prospect of recovering an attorney's fee would prompt both client and lawyer to increased litigation is one which requires serious reflection. Judge Wyzanski has reasoned that in this field "the advocate is especially worthy of large recompense. . . . Unless excellence in the trial lawyer is properly recompensed the best men will not spend their time in court, and thus there will dry up the most essential sources of an independent bar." [43] As to the possibility of abuse, safeguards inhere in the judicial process. The Court in assessing fees could prevent the antitrust laws "from developing into a racketeering practice . . . enhanced by the allowance of exorbitant and unreasonable attorney fees." [44]

So much for a brief exposition of this thesis. I do no more than suggest that this issue may well be worth further exploration.

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[43] *Cape Cod Food Products* v. *National Cranberry Ass'n*, 119 F. Supp. 242, 244 (D. Mass. 1954).

[44] *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 570 (7th Cir. 1951).

THE PITFALLS WHICH LURK IN GOVERNMENT LITIGATION FOR DEFENDANTS WHO MAY BE SUBJECTED TO TREBLE DAMAGE ACTIONS

by

MILES G. SEELEY*

The pitfalls which lurk in government litigation for defendants who subsequently may be subject to private treble damage actions under the antitrust laws are most difficult and dangerous when the government action is concluded by a judgment or decree against the defendant. I shall therefore devote most of my time to that subject.

First, however, we may note briefly some pitfalls which exist regardless of the outcome of the government action.

One danger lies in the making of judicial admissions by the defendant's attorney. Attorneys usually are cautious about qualifying what they say in briefs, consent decrees and other formal documents, but are not always equally careful about their oral statements in the presence of a Court. There are times, moreover, when intentional frankness in addressing a Court seems likely to help in achieving some immediate objective. Before making any admissions on behalf of his client, either inadvertently or intentionally, defense counsel should consider carefully the admissibility in evidence of such judicial admissions in subsequent proceedings and the possibility that under unforeseen circumstances they might be seriously prejudicial to his client.

The presentation of evidence involves other pitfalls. When evidentiary facts are scattered through voluminous records, or are generalizations of the kind which everyone knows but no one can swear to, or where they are found most conveniently in some form of publication which might not be admissible in evidence over an objection, there is frequently a temptation, and sometimes a good deal of pressure, to stipulate the facts or to prepare an exhibit in summary form. When this occurs, thought should be given to the danger of thereby making readily available to some potential private

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plaintiff proof which he might find it difficult or impossible to adduce from original sources.

Thought should be given also to insuring the future privileged status of statements, reports, summaries and analyses of evidence which are needed in preparation for trial but which may not be intended for production in court.

Having in mind the principles announced in *Hickman* v. *Taylor,*[1] it is sometimes wiser to have certain phases of trial preparation done by accountants or other experts employed directly by defendant's attorney, even when it might appear to be easier or cheaper to have the defendant do the work with his own employees.

These pitfalls, however, usually are foreseeable and avoidable. The dangers which lurk in Section 5 of the Clayton Act,[2] although foreseeable, are not always avoidable. The application of Section 5 to private actions under the antitrust laws is fraught with interesting and difficult problems.

A large percentage of all antitrust treble damage actions (as high as eighty percent, it is said) consists of suits brought as the aftermath of successful government action against the same defendants. Section 5 of the Clayton Act is designed to encourage such suits.

Broadly speaking, a treble damage action brought under Section 7 of the Sherman Act and Section 4 of the Clayton Act[3] involves two issues—whether the defendants have violated the antitrust laws and whether, as a direct consequence of such violation, the plaintiff has suffered recoverable damages.

Section 5 of the Clayton Act operates upon the first of these issues—the alleged guilt of the defendants. It provides in part:

> "A final judgment or decree . . . in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding by any other party against such defendant under said laws as to all matters

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1 *Hickman* v. *Taylor,* 329 U. S. 495 (1947).

2 15 U. S. C. Sec. 16.

3 15 U. S. C. Sec. 15.

respecting which said judgment or decree would be an estoppel as between the parties thereto. . . ."

There is a proviso that this section shall not apply to consent judgments and a further paragraph in the section suspends the running of the statute of limitations against private actions during the pendency of a government suit.

For convenience I shall use the term "prior judgment" hereafter to include both criminal judgments and decrees in equity entered in antitrust suits brought by the government.

Let us consider first the nature and seriousness of the threat to treble damage defendants which Section 5 poses, and then go on to a brief review of some of the ways in which such defendants may hope to escape or to minimize that threat.

Section 5, in order to make it easier for a treble damage plaintiff to prove a violation of the antitrust laws by a defendant, subverts basic principles of trial procedure which are virtually sacred in other fields of civil litigation.

First, by giving to prior judgments the effect of "prima facie evidence" for the plaintiff, this statute in practical effect reverses the burden of proof on the issue of the defendant's guilt, placing on the defendant the onus of proving its innocence in the face of a contrary presumption.

Second, Section 5 creates a unique exception to the long-established general rule that judgments in suits between other parties are not competent evidence of the truth of the supposed facts upon which the prior judgments were rendered.[4] To assume that such judgments are reliable as evidence is to ignore the fact that they are merely conclusory opinions which, measured by the basic principles of evidence, are pure hearsay, and that all practicing lawyers know that they frequently rest upon evidence which was incomplete, poorly presented, mistaken or even perjured, so that to accept a prior judgment as evidence is as liable to perpetuate error as it is to aid in the search for truth.

A prior judgment may create an estoppel in subsequent litigation between the *same parties*, but the estoppel is based upon the practical

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[4] *Buckeye Powder Co. v. DuPont Powder Co.*, 248 U. S. 55, 63 (1918).

necessity of imparting finality to the prior judgment rather than upon giving it an evidentiary effect.

Consequently, when Section 5 provides that a prior judgment may have the effect of *evidence* "as to all matters respecting which such judgment or decree would be an estoppel as between the parties thereto," it perverts the whole theory of estoppel by judgment. We need no clearer demonstration of the absence of true equivalence between the doctrine of estoppel by judgment and the rule of evidence created by Section 5 than the fact that a prior judgment of "not guilty" in a government case is wholly inadmissible in private cases as evidence of the defendant's innocence, although it would be a complete estoppel between the original parties.

These, however, are only the theoretical ways in which Section 5 strips treble damage defendants of procedural rights long held to be possessed by defendants in other kinds of civil suits. What are the practical effects of Section 5?

It is not too much to say that in many cases—and particularly in jury cases—one such effect is that of a conclusive presumption of the defendant's guilt. The statute purports to give to the prior judgment only *prima facie* effect, but the burden of attempting to overcome that effect by other evidence may be insupportable for all practical purposes. The prospect of re-trying the issues upon which the prior judgment was rendered would be a discouraging one in any case. Not only would the required expenditure of time and money be formidable—particularly if a protracted government suit were followed by a number of separate private actions—but the prestige of a prior judgment, particularly when it has been affirmed by a court of appeals or by the Supreme Court, is almost unassailable. Trial courts are loath to question the final judgments of other courts of equal or superior jurisdiction, while juries are emotionally almost incapable of believing that a judgment obtained by the United States Department of Justice could have been wrong.

Nor is that the end of Section 5's effect. Acceptance of the correctness of the prior judgment carries with it a prejudice against the defendant which colors the entire case. Judge Augustus Hand had this in mind when he exclaimed in the course of the *Paramount* case: "This . . . is crude judicial stuff, from the point of view of

a judge, very, very crude stuff!"[5] So did Judge Clark, of the same Court, when he described a prior judgment offered under Section 5 as: ". . . evidence of such slight probative value but potentially high emotive impact on a jury of laymen."[6]

Inasmuch as Section 5 does not apply to consent judgments, it is obvious that a realistic appraisal of the possible impact of Section 5 in subsequent treble damage actions must be a major factor in determining whether a defendant in a government suit should defend the case or should attempt to negotiate a consent decree or to offer a plea of *nolo contendere*. We have not time today, however, to pursue that subject, which would involve us in the large questions of who may recover damages on account of violations of the antitrust laws and what kinds and amounts of damages are recoverable. The risk involved in the defense of any government action would have to be assessed according to the particular defendant's exposure and vulnerability to treble damage judgments.

Let us therefore assume that a defendant in a government action has accepted the risks of making a defense but has lost, judgment being entered for the government, and that thereafter a treble damage suit has been brought against the same defendant in which the plaintiff intends to offer the prior judgment pursuant to Section 5. What can the defendant hope to do then to avoid or to soften the impact of Section 5?

First of all, he may contend, as a few defendants have done recently, that Section 5 is unconstitutional. The argument to be made is that the defendant had a constitutional right, under the Fifth and Sixth Amendments, to present his defense in the government action and that Congress could not impair that right by conditioning it upon the defendant's acceptance of potential penalties as severe as those which Section 5 imposes.

This argument is well buttressed by analogous authorities and is logically formidable.[7] Its weaknesses are, first, that Section 5 was

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[5] *United States* v. *Paramount Pictures, Inc.* (S. D. N. Y., 1950; S. T. 921).

[6] *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F. 2d 629, 633 (C. A. 2, 1952).

[7] *Ex Parte Young*, 1908, 209 U. S. 123, 147; *Willcox* v. *Consolidated Gas Co.*, 1909, 212 U. S. 19, 53; *Missouri P. R. Co.* v. *Tucker*, 1913, 230 U. S. 340, 349;

enacted about forty years before its constitutionality was challenged, and second, that in many minds Section 5 declares a desirable public policy. It is thought to supplement government enforcement of the antitrust laws and to equalize the supposed disparity in private damage actions between antitrust violators, all of whom presumably are powerful, rich and malevolent, and the claimed victims of their wrongdoing, all of whom by hypothesis are weak, poor and deserving.

So far the constitutional argument has been passed upon only twice—both times adversely, by District Courts.[8] It cannot be said with any certainty that other courts will be better disposed toward the argument, but certainly every defendant in a position to do so should advance the constitutional challenge to Section 5 until it shall have been ruled on by the Supreme Court.

Assuming the constitutionality of Section 5, we come next to other very interesting questions—both procedural and substantive.

In view of the highly prejudicial effect of permitting a jury even to hear about a prior adjudication of a defendant's guilt, several trial courts have limited the right of plaintiff's counsel who intends to rely upon a prior judgment to discuss it in his opening statement, or on any other occasion, in the jury's presence, until the Court shall have ruled on its admissibility.[9] No defendant should fail to ask for such a ruling in advance of trial, lest much of the prejudice which a prior judgment can create be injected into the jury's mind even though the judge might later decide that the prior judgment was inadmissible.

I find particularly challenging a procedural problem with which the courts have not yet come to grips, except fumblingly and inconsistently. It is now generally understood that a trial court in a treble damage suit may consider not only the prior judgment upon which the plaintiff seeks to rely, but also such portions of the record

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Missouri P. R. Co. v. *Nebraska*, 1910, 217 U. S. 196, 207; *Wadley Southern Railway Co.* v. *Georgia* (1915), 235 U. S. 651, 662.

[8] *Essaness Theatres Corporation* v. *Balaban & Katz Corporation* (N. D. Ill. E. D., 1955), CCH 1955 Trade Cases No. 68,152; *Congress Building Corporation* v *Loew's Incorporated* (N. D. Ill. E. D., No. 50 C 1244, Nov. 3, 1958).

[9] *T. C. Theatres* v. *Warner Bros.* (S. D. N. Y., Civ. No. 75-213, May 11, 1955, S. T. 82, 100); *Claughton* v. *Paramount* (S. D. Fla., No. 468-M-Civil, Sept. 14, 1954, S. T. 5-6); *Wolfe* v. *National Lead Co.*, 15 F. R. D. 61 (N. D. Cal. S. D., 1953); *Mitchell* v. *RKO* (D. C. Mass., Civ. No. 52-1156-F, July 14, 1958).

underlying that prior judgment as may be helpful in determining exactly what was adjudicated thereby. It is generally understood also that in a jury case the trial judge, either at the time of admitting the prior judgment in evidence or in his instructions at the end of the trial, or at both times, should instruct the jury as to the effect which they should give to the prior judgment.[10]

What has not been decided adequately—or even discussed adequately—in the cases is what may be read to the jury or argued to them by the plaintiff's attorney.

Because Section 5 refers to the prior judgment as "evidence," it has been assumed generally that it, at least, may be read and argued to the jury.[11] In addition, a number of courts, seemingly without any real consideration of the principles involved, have permitted parts of the underlying record, such as findings and conclusions, to be read and argued to the jury.[12]

I submit that this is fundamentally unsound as well as unfairly prejudicial to defendants. The question of what the prior judgment means—that is, what was decided thereby which is competent and relevant in the instant private suit—obviously is one of pure law. It is, moreover, the kind of legal question which only a trained legal mind can be expected to understand. Why, then, should either the prior judgment or any of the record underlying it be given to the jury? The same judges who permit it to be done recognize, quite inconsistently, it seems to me, that it is their duty to explain to the jury what the prior judgment means and what effect the jury should give to it.

Neither the misconceptions of fact and of law, nor the prejudice, instilled in a jury's mind by permitting portions of a prior legal proceeding to be read and argued to them, can be cured by instructions of the trial judge. As Mr. Justice Jackson once said

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10 *Emich Motors* v. *General Motors*, 340 U. S. 558 (1951).

11 *Cinema Amusements, Inc.* v. *Loew's, Inc.* (D. Cal., Civil No. 2800, 1952); *Theatre Enterprises* v. *Paramount* (D. Md., Civil No. 5303, 1952, S. T. 1506-8); aff'd 346 U. S. 357 (1954).

12 *Twentieth Century-Fox* v. *Brookside Theater Corp.*, 194 F. 2d 849 (C. A. 8, 1952); cert. den., 343 U. S. 942 (1952); *J. J. Theatres* v. *Twentieth Century-Fox* (S. D. N. Y., Civil No. 49-80, 1953, S. T. 1264-72); rev'd on other grounds, 212 F. 2d 840 (C. A. 2, 1954).

"The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." [13]

Since the questions involved are purely legal, it would be far more sound procedurally, as well as more fair, to hold that the prior judgment and relevant parts of the record underlying it are evidence for the Court alone, so that the Court may instruct the jury, in language which it can understand, and without inflammatory characterizations, what was decided in the prior case which is to be considered as *prima facie* evidence in the instant case. Judge Kirkpatrick of the Third Circuit partially adopted this view when he said, "It was discretionary with the court to decline to give to the jury the decree to take out with them, a document which would probably have merely bewildered them and brought on discussions of all sorts of extraneous matters." [14]

I believe that there is persuasive precedent for my position in the proof of foreign law by expert witnesses, as to which, after some confusion, the doctrine emerged that although foreign law is to be proved as facts are proven, the evidence is for the Court, not the jury, since it relates wholly to a question of law as to which the jury has no function other than to follow the instructions of the Court.[15]

We are not left with much time in which to mention some of the substantive limitations on the admissibility of prior judgments under Section 5. The touchstone of all such questions is the law of estoppel by judgment.[16] It is a tenet of that law that estoppels arise only as to matters actually and necessarily decided by the prior

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[13] *Krulewitch* v. *United States,* 336 U. S. 440, 453.

[14] *Harrison* v. *Paramount,* 115 F. Supp. 312, 315 (E. D. Pa., 1953); see also *Claughton* v. *Paramount* (S. D. Fla., Miami Div., No. 4068-M-Civil, Oct. 20, 1954, S. T. 2997).

[15] *Liechti* v. *Roche,* 198 F. 2d 174 (C. A. 5, 1952); *Mexican N. R. Co.* v. *Slater,* 115 Fed. 593, 606 (C. A. 5, 1902); *Compania Transcontinental de Petroleo* v. *Mexican Gulf Oil Co.,* 292 Fed. 846 (C. A. 2, 1923); *Christiansen* v. *Graver Tank Works,* 223 Ill. 142, 79 N. E. 97 (1906); *Bank of China* v. *Morse,* 168 N. Y. 458, 470; 61 N. E. 774 (1901); *Rood* v. *Horton,* 132 Wash. 82, 231 Pac. 450 (1924); *Hooper* v. *Moore,* 5 Jones (N. C.) 130 (1857); *Franzen* v. *Equitable Life Assur. Soc.,* 130 N. J. L. 457; 33 Atl. 2d 599 (1943); *Wigmore on Evidence* (Third Ed.), Sec. 2558.

[16] *Emich Motors* v. *General Motors,* 340 U. S. 550, 568, 569 (1951).

judgment and not as to things which could have been but were not decided, or which by argument or inference might have been decided, or which were decided but were not necessary to the rendition of the judgment.[17] This requires a defendant's attorney to be prepared with a thorough study and analysis of the case in which the prior judgment was rendered, so that he can argue effectively as to what was actually and necessarily decided therein.

Estoppel by judgment requires not only identity of the parties, which is dispensed with by Section 5 so far as plaintiffs are concerned, but also identity of the issues.[18] It is equally important, therefore, for defendant's attorney to have analyzed the plaintiff's case so as to be able to point out to the trial judge precisely wherein the issues in the instant case may differ from what was decided in the prior case. Good results along these lines have been achieved by persuading Courts to reject prior judgments or to limit their evidentiary effect because they adjudicated facts as to a different period of time[19] or a different place[20] or different parties[21] or a different kind of restraint of trade or monopolization[22] than the case on trial involved.

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[17] *Cromwell* v. *County of Sac,* 94 U. S. 351, 352-353 (1876); *U. S.* v. *International Building Co.*, 354 U. S. 502, 504 (1953); *Freeman on Judgments* (4th Ed.), Sec. 257-259.

[18] *United States* v. *Moser,* 266 U. S. 236, 241 (1924); *New Orleans* v. *Citizens Bank,* 167 U. S. 371, 396 (1893).

[19] *Orbo Theater Corp.* v. *Loew's,* 156 F. Supp. 770 (D. C., D. C. 1957); *Springfield Drive-In Theatre* v. *Universal* (S. D. Ill., Civil No. 1240, May 5, 1952) and *Applebaum* v. *Paramount* (S. D. Miss., Civil No. 373, July 16, 1951, S. T. 5069-70); *Metropolitan Theatres* v. *Loew's* (S. D. Cal., C. D., No. 13, 115-HW-Civil, Oct. 1, 1954, S. T. 1953-4); *Paramount* v. *Village Theatre,* 228 F. 2d 721 (C. A. 10, 1956); *Robbinsdale Amusement Corp.* v. *Warner Bros.*, 141 F. Supp. 134 (D. Minn., 1955); *Shotkin* v. *General Electric Co.*, 171 F. 2d 236, 238 (C. A. 10, 1948); *Park Neponset Corp.* v. *Smith,* 258 F. 2d 452, 456 (C. A. 1, 1958).

[20] *Theatre Enterprises* v. *Paramount,* 346 U. S. 537, 543 (1954); *Sun Theatre* v. *RKO,* 213 F. 2d 284, 290 (C. A. 7, 1954).

[21] *Applebaum* v. *Paramount* (S. D. Miss., Civil No. 373, July 16, 1951, S. T. 5071-2); *Dipson Theatres* v. *Buffalo Theatres,* 190 F. 2d 951, 958 (C. A. 2, 1951); *Proper* v. *John Bene & Sons,* 295 F. 729 (E. D. N. Y., 1923).

[22] *Hillside* v. *Warner Bros.*, 224 F. 2d 629 (C. A. 2, 1955); *Dipson* v. *Buffalo Theatres,* 190 F. 2d 951, 952 (C. A. 2, 1951); *Chorak* v. *RKO,* 196 F. 2d 225, 229 (C. A. 9, 1952), cert. den. 344 U. S. 887 (1952), reh. den. 344 U. S. 910 (1952);

A particularly troublesome question in many treble damage suits has been whether a prior judgment may be admitted as evidence of the supposed history of the alleged violation of law, even though, admittedly, the wrongful act claimed to have injured the plaintiff was different in time, place, character or parties from any adjudicated by the prior judgment.

There is strong authority indicating that such use of a prior judgment should not be permitted. Judge Learned Hand, in the *Evergreens* case,[23] distinguished between "ultimate facts," or those upon whose occurrence the law raises a duty or a right, and "mediate data," which are the underlying or evidentiary facts from which ultimate facts might be inferred. He held in that case, where the question was estoppel by prior judgment, that an estoppel could arise only as to a fact which was ultimate—that is, essential to the plaintiff's case—in both suits.[24] The Restatement of Judgments subsequently adopted this view.[25]

More recently the Supreme Court has applied the same principle in an estoppel case, saying:

> "The sound rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in a subsequent proceeding." [26]

Since under Section 5 the test of what evidentiary effect may be given to a prior judgment is what conclusive effect that prior judgment would have as an estoppel between the original parties,

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Grand Opera Co. v. *Twentieth Century-Fox* (E. D. Ill.), 1955, CCH Trade Cases Par. 68,184; *Steiner* v. *Twentieth Century-Fox*, 232 F. 2d 190 (C. A. 9, 1956); *Samuel Goldwyn Productions* v. *Fox West Coast Theatres*, 146 F. Supp. 905 (N. D. Cal., 1956); *Eagle Lion Studios* v. *Loew's*, 141 F. Supp. 659 (S. D. N. Y., 1956); aff'd 248 F. 2d 438 (C. A. 2, 1957); cert. granted 1/20/58. (At the time of the delivery of this paper the *Eagle Lion* case is about to be argued in the Supreme Court. The decision in that case, if rendered on broad grounds, could be of great significance.)

23 *The Evergreens* v. *Nunan*, 141 F. 2d 927, 928 (C. A. 2, 1944).

24 See also, *Grandview Dairy* v. *Jones*, 157 F. 2d 5, 10 (C. A. 2, 1946), cert. den. 329 U. S. 787 (1947); *U. S.* v. *Five Cases*, 156 F. 2d 493, 495 (C. A. 2, 1946); *Hoffman* v. *Hoffman*, 330 Ill. 413, 418 (1928); *Locomotive Engineers, etc.* v. *Laurent*, 172 F. 2d 889 (C. A. 7, 1949).

25 *Restatement of the Law of Judgments*, §68(1) and (2) and 1948 Supplement.

26 *Yates* v. *United States*, 354 U. S. 298, 337-338 (1957).

it would seem to follow that a prior judgment may not be used in a private antitrust action to establish facts which are merely historical or otherwise mediate or evidentiary.

Difficulty occurs in attempting to apply the *Evergreens* doctrine where a plaintiff alleges that there existed at the same time a broad conspiracy, as evidence of which a prior judgment is offered, and, as a part thereof, a more particular conspiracy which injured the plaintiff but which was not adjudicated in the prior case. It is difficult to decide in such cases whether or not the broad conspiracy is an ultimate fact in the private plaintiff's cause of action. The tendency of the courts has been to admit the prior judgment in such cases but to caution the jury that the plaintiff must prove by independent evidence that particular conspiracy alleged to have caused his injury.[27] However, a Court has stricken from a complaint all references to a prior judgment when the complaint, instead of alleging that the particular conspiracy complained of was a part of the broad conspiracy previously adjudicated, alleged merely that it was "related to and a consequence of" the broad conspiracy.[28]

You will have gathered from these necessarily brief remarks that Section 5 poses a very serious threat to defendants and potential defendants in antitrust treble damage suits which must be borne in mind from the moment a government antitrust suit or investigation is commenced, but that there are ways to avert the threat in some cases.

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[27] *Emich Motors* v. *General Motors*, 340 U. S. 558 (1951); *Theatre Enterprises* v. *Paramount* (D. Md., Civil No. 4303, 1952, S. T. 1678, 1682), aff'd 346 U. S. 537, 1954; *Sun Theatre* v. *RKO*, 213 F. 2d 284 (C. A. 7, 1954); *J. J. Theatres, Inc.* v. *Twentieth Century-Fox* (S. D. N. Y., Civil No. 49-80, 1953, S. T. 1268), rev'd on other grounds, 212 F. 2d 840 (C. A. 2, 1954).

[28] *Winchester Theatre Co.* v. *Paramount* (D. Mass., Civil No. 58-78-S, Apr. 2, 1958).

HANDLING A PLAINTIFF'S ANTITRUST DAMAGE SUIT

by

LEE LOEVINGER*

What makes a good antitrust case from the plaintiff's viewpoint is easy to state though difficult to find. There should be in the first place a clear, substantive violation of the antitrust laws. Second, this should be the obvious proximate cause of substantial damages to the plaintiff, and, from the viewpoint of potential litigation, the greater the damage the better the case. Third, there should be one or more available and solvent defendants able to respond in damages if judgment is obtained. Fourth, the conduct complained of should be of a kind that seems to be socially undesirable at least. Whether or not it is technically required to prove public injury is a point that will be mentioned in a moment. However, from plaintiff's viewpoint it seems to me that a case is certainly strengthened if it has the sentimental appeal of appearing to involve the public interest, whether or not this is legally required. Fifth, the plaintiff should have adequate financial resources to meet the inevitable costs of litigation since, even in the best circumstances, substantial amounts will have to be advanced before there can be any expectation of reimbursement. Finally, but by no means the least, the plaintiff, or the moving party, should be a stable, credible and determined person who is prepared to pursue his rights and remedies through the usually protracted and arduous course of an antitrust trial.

Of course, it will be a rare case in which all of these elements will be found to exist in precisely the degree a lawyer would most like to have them. Perfect plaintiffs' antitrust cases are as rare as perfect cases in any other field of law, and perhaps more rare. However, these are the elements that are important to a lawyer in handling a plaintiff's antitrust case; and to the degree that any of them are weak or lacking, a lawyer must carefully weigh the desirability of embarking upon litigation.

Generally, the substantive law applicable to private antitrust suits for damages is the same as the substantive law applicable to any other type of antitrust action. This is not uniformly true,

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however, as witness the *Nashville Milk* decision holding that Section 3 of the Robinson-Patman Act is not part of the antitrust laws for purposes of private action.[1] The field of substantive antitrust law is of great breadth and complexity and fortunately lies outside the scope of this discussion. Perhaps, however, it is fair to say that although the substantive law applicable to private damage actions under the antitrust laws is the same as antitrust law generally in principle, there is a noticeable tendency on the part of at least some courts to apply the law somewhat more narrowly and to be somewhat stricter in demanding proof in a private action than in a government action. As Chief Judge Clark of the Court of Appeals for the 2nd Circuit has said: "There seems to be a developing trend in some of our trial courts of hostility toward the 'big' antitrust case and of discovering obstacles going even back to matters of pleading and pre-trial—in the way of a free showing of the need of remedial relief." [2]

A problem found in private antitrust litigation and not present in other antitrust litigation involves the issue of who may complain where there is a violation of the antitrust laws. It is, of course, clear that the plaintiff must be an injured party.[3] However, there is some diversity among the courts as to how closely the plaintiff must be related to the injury in order to have the right to bring suit. Thus, there is conflict among the decisions as to whether or not a derivative shareholder's action for damages to the corporation will lie,[4] and as to whether or not a landlord whose rent is based

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1 *Nashville Milk Co.* v. *Carnation Co.*, 78 S. Ct. 352 (1958).

2 *Eagle Lion Studios* v. *Loew's, Inc.*, 248 F. 2d 438, at 451 (dissenting opinion) (C. A. 2d 1957). Also see *Allgair* v. *Glenmore Distilleries Co.*, 91 F. Supp. 438, at 451 (N. Y. 1950); *Paramount Film Distributing Corp.* v. *Applebaum*, 217 F. 2d 101, at 105 (C. A. 5th 1954). Cf. *Klein* v. *Lionel Corporation*, 237 F. 2d 13 (C. A. 3rd 1956). For an illustrative example compare the court's approach to cost justification in *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38 (C. A. 8th 1951), and in *Moog Industries* v. *Federal Trade Comm.*, 238 F. 2d 43 (C. A. 8th 1956). See Loevinger, Private Action—The Strongest Pillar of Antitrust, 3 Antitrust Bull. 167, 170 (Mar.-Apr. 1958); Loevinger, Enforcement of the Robinson-Patman Act by Private Parties, 1957 Antitrust Law Symposium (CCH) 145, 158.

3 15 U. S. Code Sec. 15. See *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 39 F. Supp. 119 (N. Y. 1941); Cf. *United States* v. *Cooper*, 312 U. S. 600 (1941).

4 Shareholders do not have right of action for injury to corporation. *Peter* v. *Western Newspaper Union*, 200 F. 2d 867 (C. A. 5th 1953), commented on, 101 Pa.

in part upon the percentage receipts of a business may sue for injury to that business.[5] It seems fairly clear that a partner of an injured partnership may sue, even after dissolution of the partnership.[6] It has been stated that whether or not a plaintiff has an action depends upon whether or not the plaintiff is one who was within the "target area" of the illegal practices engaged in by the defendant.[7] Whether or not this is a very helpful formulation, it seems to be about the best available.

One of the most troublesome of the problems confronting the lawyer for an antitrust plaintiff is usually that of proving damages. The reason for this arises largely from the inherent nature of the situation. Ordinarily a plaintiff will complain about either the diminution or the destruction of his business. In order to assess his damages it will be required to determine how much his profits have been diminished or how much he has lost by destruction of the business. It will appear to most lawyers almost from the nature of the case that such things are necessarily speculative and conjectural.

There is, indeed, an element of truth in the conclusion that damages in an antitrust case usually have a somewhat speculative element in them. Nevertheless, the courts have held that this does not and cannot preclude the awarding of damages. In a number of cases it has been held that although the fact of damage to the

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L. R. 1071 (May 1953); *Walder* v. *Paramount Publix Corp.*, 132 F. Supp. 912 (N. Y. 1955); *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 214 U. S. 261 (1917); *Fleitman* v. *Welsbach Street Lighting Co.*, 240 U. S. 27 (1916); *Gerli* v. *Silk Association of America*, 36 F. 2d 959 (N. Y. 1929); *Westmoreland Asbestos Co.* v. *Johns-Mansville Corp.*, 30 F. Supp. 389, 32 F. Supp. 731 (N. Y. 1939), aff'd 113 F. 2d 114. Cf. *Peterson* v. *Borden Co.*, 50 F. 2d 644 (C. A. 7th 1951). However, there seems to be a modern tendency to permit a derivative shareholder's action where the corporation has been injured. *Kogan* v. *Schenley Industries*, 20 F. R. D. 4 (Del. 1956); *Fanchon & Marco, Inc.* v. *Paramount Pictures*, 202 F. 2d 731 (C. A. 2d 1953).

5 Lessor under percentage lease does not have standing to sue. *Harrison* v. *Paramount Pictures, Inc.*, 115 F. Supp. 312 (Pa. 1953), aff'd 211 F. 2d 405, cert. den. 348 U. S. 828. Such lessor does have standing to sue. *Congress Building Corp.* v. *Loew's*, 246 F. 2d 587 (C. A. 7th 1957). Cf. *Steiner* v. *Twentieth Century-Fox Film Corp.*, 232 F. 2d 190 (C. A. 9th 1956).

6 *Leh* v. *General Petroleum Corp.*, 27 L. W. 2142 (Cal. Oct. 15, 1958).

7 *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358 (C. A. 9th 1955); *Productive Inventions* v. *Trico Products*, 224 F. 2d 678 (C. A. 2d 1955), cert. den. 350 U. S. 936. Cf. *Peller* v. *International Boxing Club*, 227 F. 2d 593 (C. A. 7th 1955).

plaintiff must be proved by a clear preponderance of the evidence, the amount of damages need not be capable of precise proof or exact calculation.[8] As the Court of Appeals for the 8th Circuit has said:

> "The damages recoverable under the Federal Antitrust Law . . . must be actual damages and not speculative or conjectural. The uncertainty, however, which precludes the recovery of particular damages is uncertainty as to whether they are the result of the tortious acts of defendant, rather than uncertainty as to amount, and the fact that damages cannot be calculated with mathematical exactness does not make them so uncertain as to bar recovery." [9]

The Supreme Court has justified this rule by saying:

> "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of recovery. The most elementary concepts of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." [10]

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[8] *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre*, 194 F. 2d 846 (C. A. 8th 1952), cert. den. 343 U. S. 942; *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251 (1946), reh. den. 327 U. S. 817; *Bordonaro Bros. Theatres* v. *Paramount Pictures*, 176 F. 2d 595 (C. A. 2d 1949); *William Goldman Theatres* v. *Loew's*, 69 F. Supp. 103 (Pa. 1946); aff'd 164 F. 2d 1021; *Darden* v. *Besser*, 147 F. Supp. 376 (Mich. 1956); *Eastman Kodak* v. *Southern Photo Material Co.*, 272 U. S. 359 (1927); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555 (1931); *Kobe* v. *Dempsey Pump Co.*, 198 F. 2d 416 (C. A. 10th 1952), cert. den. 344 U. S. 837; *Cape Cod Food Products* v. *National Cranberry Ass'n*, 119 F. Supp. 900 (Mass. 1954); *Bruce's Juices* v. *American Can Co.*, 87 F. Supp. 985 (Fla. 1949), aff'd 187 F. 2d 919, pet. for cert. dismissed 342 U. S. 875; *Johnson* v. *Joseph Schlitz Brewing Co.*, 33 F. Supp. 176 (Tenn. 1940), aff'd 123 F. 2d 1016.

[9] *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre*, 194 F. 2d 846, at 855 (C. A. 8th 1952), cert. den. 343 U. S. 942.

[10] *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, at 264-265 (1946).

The general measure of damages is, of course, the pecuniary loss to the plaintiff's business or property resulting proximately from the acts of the defendants.[11] The difficult problem comes in devising a means of establishing the amount of this pecuniary loss to the satisfaction of a Court, even under the liberal view applicable to such proof as set forth in the preceding cases. A number of different measures have been applied by the courts in various cases. Differences in cost of doing business if not passed on or recovered are, of course, proper proof of recoverable damages.[12] The loss of anticipated sales or business if reasonably inferable either from the records of the plaintiff or otherwise, are recoverable as damages.[13] The loss of potential business as shown by comparison with the business of a favored competitor, is a commonly used measure of damages, particularly in the motion picture cases.[14] Loss of profits as a result of a reduction in price forced by defendants may measure damages.[15] The value of a property or a business which has been totally lost to the plaintiff may be shown as recoverable damages.[16] The informed estimate of experts as to the damage or loss to a

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11 *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre*, 194 F. 2d 846 (C. A. 8th 1952), cert. den. 343 U. S. 942; also see cases cited in Notes 6 to 10.

12 *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (C. A. 2d 1953), cert. den. 345 U. S. 994; *Thomsen* v. *Cayser*, 243 U. S. 66 (1917); *Atlanta* v. *Chattanooga Foundry*, 127 F. 23 (C. A. 6th 1903), aff'd 203 U. S. 391; *Monarch Tobacco Works* v. *American Tobacco Co.*, 165 F. 774 (C. C. Ky. 1908); *Loder* v. *Jayne*, 142 F. 1010 (C. C. Pa. 1906), rev. other grounds 149 F. 21; *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988 (C. A. 8th 1945).

13 *Eastman Kodak Co.* v. *Southern Photo Material Co.*, 295 F. 98 (C. A. 5th 1923), aff'd 273 U. S. 359 (1927); *Cape Cod Food Products* v. *National Cranberry Ass'n*, 119 F. Supp. 900 (Mass. 1954); *Darden* v. *Besser*, 147 F. Supp. 376 (Mich. 1956); Cf. *Sun Cosmetic Shoppe* v. *Elizabeth Arden Sales Corp.*, 178 F. 2d 150 (C. A. 2d 1949); *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251 (1946).

14 *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251 (1946); *Milwaukee Towne Corp.* v. *Loew's*, 190 F. 2d 561 (C. A. 7th 1951), cert. den. 342 U. S. 909; *Homewood Theatre* v. *Loew's*, 110 F. Supp. 398 (Minn. 1952), app. dis. 207 F. 2d 263; *William Goldman Theatres* v. *Loew's*, 69 F. Supp. 103 (Pa. 1946), aff'd 164 F. 2d 1021, cert. den. 334 U. S. 811.

15 *American Co-op Serum Ass'n* v. *Anchor Serum Co.*, 153 F. 2d 907 (C. A. 7th 1946), cert. den. 329 U. S. 721, reh. den. 329 U. S. 826.

16 *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115 (1954); *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre*, 194 F. 2d 846 (C. A. 8th 1952), cert. den. 343 U. S. 942.

business may properly be used as a basis for awarding damages.[17] Further, the various methods of measuring damages are not mutually exclusive, and, in the words of the Supreme Court, "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done," under the antitrust laws.[18] Thus, the Court has great latitude in determining or estimating the amount of damages in an antitrust case,[19] and, correspondingly, counsel are called upon to exercise ingenuity and originality in securing satisfactory evidence on this subject.

The Statute of Limitations usually operates more as a limitation upon the amount of damages that can be recovered than upon the right to institute suit. While this is not always true, it is frequently the case that antitrust actions will be brought while the situation complained of is continuing, and thus the limitations period will restrict the time for which recovery may be sought rather than preclude the bringing of the suit. In any event, the limitations period is now clearly specified by Federal statute. Prior to 1955 there was no Federal statute on the subject, so reference was made to the laws of the several states to set the limitations period. This resulted in considerable conflict and confusion among jurisdictions. However, in 1955 Congress amended the antitrust laws to prescribe a four-year statutory period of limitations. Since January 7, 1956 this has been the applicable period.[20]

An interesting question that has recently been brought to the fore in private antitrust litigation is whether or not it is necessary to show that a violation of the antitrust laws which results in damage to the business or property of an individual must also result in "public injury" in order to be actionable. There are several recent cases holding that it is not enough to plead antitrust violation result-

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17 *Sablosky* v. *Paramount Film Distributing Corp.*, 137 F. Supp. 929 (Pa. 1955); *Fox Midwest Theatres* v. *Means*, 221 F. 2d 173 (C. A. 8th 1955); *William H. Rankin Co.* v. *Associated Bill Posters*, 42 F. 2d 152 (C. A. 2d 1930), cert. den. 282 U. S. 864.

18 *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, at 265 (1946).

19 *McWhirter* v. *Monroe Calculating Machine Co.*, 76 F. Supp. 456 (Mo. 1948); *Bruce's Juices* v. *American Can Co.*, 87 F. Supp. 985 (Fla. 1949), aff'd 187 F. 2d 919, pet. for cert. dismissed 342 U. S. 875.

20 Act of July 7, 1955, c. 283, Sec. 1, 69 Stat. 283; codified as 15 U. S. Code Sec. 15b (effective Jan. 7, 1956).

ing in injury to the plaintiff, but that there must also be alleged facts from which the Court can infer public injury in order to sustain plaintiff's right to a remedy.[21] The Supreme Court has recently granted certiorari in one of these, and the issue may be decided during the present term.[22] In the meantime, it may be noted that there are cases distinctly looking the other way.[23] In my opinion, the soundest rule with respect to this issue is that stated by the District Court in eastern Pennsylvania which said: "The public is interested in the preservation of free competition. And when competition is restrained by means declared unlawful by the antitrust laws, the interest of the public is harmed." [24]

An important aspect of the law in antitrust litigation is the provision that a plaintiff who prevails in a private damage suit is entitled to recover not only treble damages and taxable costs but also reasonable attorneys' fees.[25] It should be noted that while the Court is not entitled to consider the contingent character of the litigation in awarding fees, it is supposed to award adequate fees for the services rendered.[26] It might also be noted that attorneys'

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[21] *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 255 F. 2d 214 (C. A. 9th 1958), cert. granted Oct. 13, 1958, 27 L. W. 3099; *Miller Motors* v. *Ford Motor Co.*, 252 F. 2d 441 (C. A. 4th 1958); *Admiral Theatre Corp.* v. *Paramount Film Distributing Corp.*, 140 F. Supp. 686 (Neb. 1955); *National Used Car Market Report* v. *National Auto Dealers Ass'n*, 108 F. Supp. 692 (D. C. 1951); *Slick Airways, Inc.* v. *American Airlines, Inc.*, 15 F. R. D. 175 (N. J. 1954); *Bader* v. *Zurich G. A. & L. I. Co.*, 12 F. R. D. 437 (N. Y. 1952).

[22] *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, cert. granted Oct. 13, 1958, 27 L. W. 3099.

[23] *Professional & Business Men's L. I. Co.* v. *Bankers Life Co.*, 163 F. Supp. 274 (Mont. 1958); *Reserve Life Ins. Co.* v. *Bankers Life & Casualty Co.*, —— F. 2d —— (C. A. 5th June 30, 1958); *Kentucky-Tennessee Light & Power Co.* v. *Nashville Coal Co.*, 37 F. Supp. 728 (Ky. 1941).

[24] *William Goldman Theatres* v. *Twentieth Century-Fox*, 151 F. Supp. 840, at 843 (Pa. 1957). Also, N. B. statement of Supreme Court in *Radovitch* v. *National Football League*, 352 U. S. 445, at 454 (1957), "These (antitrust) laws protect the victims of the forbidden practices as well as the public."

[25] 15 U. S. Code Sec. 15.

[26] *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre*, 11 F. R. D. 259 (Mo. 1951), 194 F. 2d 846 (C. A. 8th 1952), cert. den. 343 U. S. 942; *Cape Cod Food Products* v. *National Cranberry Ass'n*, 119 F. Supp. 242 (Mass. 1954); *Bordonaro Bros.* v. *Paramount Pictures*, 113 F. Supp. 196 (N. Y. 1953); *Noerr Motor Freight, Inc.* v. *Eastern Railroad Presidents Conference*, 27 L. W. 2037 (Pa. July 22, 1958); *Darden* v. *Besser*, 257 F. 2d 285 (C. A. 6th 1958).

fees may be awarded only if the Court finds some damages in favor of the plaintiff, and may not be awarded where the plaintiff secures only an injunction.[27]

A few years ago private antitrust suits were made particularly attractive by virtue of the rule that the punitive portion of the treble damage recovery was not taxable as income.[28] In 1955 the Supreme Court reversed this ruling, thereby subjecting the entire recovery of the plaintiff to taxation as ordinary income in the year when received.[29] Congress has recently adopted a middle ground by providing that any moneys received as settlement for or a judgment in an antitrust case shall be taxed as income but at a rate not greater than that which would have been imposed had the amounts received been included in gross income of the taxpayer during the damage period.[30]

One other point should be made regarding the law particularly applicable to private antitrust suits. Although we commonly think in terms of actions initiated by the injured party, it must not be overlooked that antitrust violation may be, and not infrequently is, useful as a defense or counterclaim. This is subject to certain limitations. The more recent decisions have virtually abolished *pari delicto* as a defense in an antitrust suit.[31] However, antitrust violation may be a useful defense in a patent infringement suit.[32]

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[27] *Decorative Stone Co.* v. *Building Trade Council*, 23 F. 2d 426 (C. A. 2d 1928) cert. den. 277 U. S. 594; *Alden-Rockelle, Inc.* v. *American Society of C. A. & P.*, 80 F. Supp. 888 (N. Y. 1948); *Ring* v. *Spina*, 84 F. Supp. 403 (N. Y. 1949); cf. *Finley* v. *Music Corp. of America*, 66 F. Supp. 569 (Cal. 1946).

[28] *C. I. R.* v. *Glenshaw Glass Co.*, and *C. I. R.* v. *Wm. Goldman Theatres*, 211 F. 2d 928 (C. A. 3rd 1954).

[29] *C. I. R.* v. *Glenshaw Glass Co.*, 348 U. S. 426 (1955).

[30] Technical Amendments Act of 1958, Sec. 1306; I. R. C., Sec. 1306.

[31] *Kiefer-Stewart Co.* v. *Joseph E. Seagram*, 340 U. S. 211 (1951), reh. den. 340 U. S. 939; *Mason City Tent & Awning Co.* v. *Clapper*, 144 F. Supp. 754 (Mo. 1956); *Peter* v. *Western Newspaper Union*, 200 F. 2d 867 (C. A. 5th 1953); *Interborough News Co.* v. *Curtis Pub. Co.*, 108 F. Supp. 768 (N. Y. 1952); *Trebuhs Realty Co.* v. *News Syndicate Co.*, 107 F. Supp. 595 (N. Y. 1952); *Moore* v. *Mead Service Co.*, 190 F. 2d 540 (C. A. 10th 1951), cert. den. 342 U. S. 902; *Ring* v. *Spina*, 148 F. 2d 647 (C. A. 2d 1945).

[32] *Mercoid Corporation* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944), reh. den. 321 U. S. 802; *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*,

Further, any cause of action that might properly be the basis for an antitrust suit may be equally useful as a counterclaim in case the potential defendants take the initiative. In this connection it may be noted that concerted action of the kind forbidden by the antitrust laws is ordinarily as unlawful when undertaken by small business as when engaged in by big business.

I have said initially that I do not know of any particular technique for finding antitrust lawsuits. However, it does seem to me that there is a very significant technique involved in representing plaintiffs successfully in such actions. As to this, I think that at least 75% of the foundation of successful litigation on behalf of plaintiffs in the antitrust field depends upon the selection of the cases to be brought. This, of course, involves the matter of judgment on the part of the attorney, and cannot be fully explored without covering the entire field of law involved. However, a vital element in this determination is the attitude of the attorney. It is essential to keep in mind that under the American system every lawyer performs two distinct functions: the first that of counsel and the second that of advocate. When acting as counsel a lawyer acts in a quasi-judicial capacity, and should so far as possible view his client's cause objectively, and give his client non-partisan advice. On the other hand, once an issue is joined and a lawyer is representing a client in litigation he is bound to act as his client's advocate, and to be partisan and partial to the view more favorable to his client. However, before any lawsuit, and particularly an antitrust suit is initiated, the lawyer should first act as counsel to his client and determine that there is in fact a meritorious cause with probable evidence to sustain it. There may be fields of law in which a lawyer can afford to institute an action on behalf of any client who has a complaint. If so, antitrust is certainly not one of them. The inescapable investment of time, effort and money in any antitrust case is so great that it seems to me that it is not only improper but economically suicidal for any lawyer to get either himself or his client committed to litigation unless he is reasonably

329 U. S. 394 (1947), reh. den. 330 U. S. 853; *Zenith Radio Corp.* v. *Radio Corp. of America*, 106 F. Supp. 561 (Del. 1952), reconsideration den. 109 F. Supp. 913; *Emsig Manufacturing Co.* v. *Rochester Button Co.*, 163 F. Supp. 414 (N. Y. 1958).

convinced in his own mind on an objective appraisal of the evidence and the law that there is a better than even chance of prevailing.[33]

Of course such a judgment cannot rationally be made without a fairly thorough preliminary investigation of the case. Because of the importance of this phase of the matter, the preliminary investigation is probably far more important in antitrust cases than in many other classes of litigation. This preliminary investigation should consist of complete, thorough and skeptical interrogation of one's own client, of an interrogation of any other friendly witnesses who are available prior to the institution of litigation, and of a complete examination of all documentary evidence that is available through the client or through neutral sources. It is at this point that the record of government cases may perhaps be most useful. Any information that is available from government cases can be of great assistance to a lawyer who is faced with the necessity of deciding whether or not to institute litigation. For this purpose, of course, it is not necessary that the evidence be of a character that would be admissible on the trial. Of course, the record of a criminal conviction or of the entry of a contested civil decree in a government suit may be helpful to the lawyer not only in determining his course, but also in proving his case. Beyond this, however, any information that may be secured from the files of the government case, including the pleadings, briefs and testimony, or from the opinions in a government case, or from Federal Trade Commission proceedings is relevant to the lawyer's consideration of this problem. It seems to me that regardless of the admissibility of an F. T. C. order, a lawyer is justified in giving considerably more credence to a client's story when it checks with the findings of the F. T. C. than when it has no such support. Therefore, I think that any information which can be secured from government sources at this stage of the proceedings should be considered by plaintiff's counsel.

When plaintiff's counsel has decided that there is a meritorious case, and available evidence to support it, he is then faced with the problem of weighing the utility of litigation to his client. Antitrust cases are relatively unusual in that even where a cause of action exists it is not always advantageous to a particular client

33 This point is discussed in more detail in Loevinger, The Lawyer's Role Before Litigation, 11 Vanderbilt L. R. 155 (1957).

to pursue the cause. Whether it is or not will depend upon the business situation of the client, the amount of damages to be recovered when considered against the cost of time, effort, money and destruction of business occasioned by a trial, the possibility of opening up sources of supply or markets to the client, weighed against the possibility of cutting off business relations presently existing. At this point it is certainly advisable also for the plaintiff's attorney to consider the possibility of securing relief or adjustment for his client other than by litigation. This is most likely in cases in which the client seeks access to sources of supply rather than substantial damages. However, there are many cases in which a particular practice which is thought to be restrictive may be eliminated by informal complaint and negotiation without the necessity of litigation, whereas the institution of litigation might cause the practices to be defended, and even possibly sanctioned, by judicial decision. If it is possible to secure the substantial relief sought by a client by negotiation and settlement, this will ordinarily be preferable to litigation even though it may not result in the payment of large damages which might be sought by litigation. One danger to be guarded against in this situation is that of releasing some but not all of the potential defendants, and of thus creating a legal bar to the cause of action by such a partial release.[34] Another problem involved is that, while partial settlements can legally be made without barring litigation against other defendants,[35] a case in which some of the defendants are absent is almost always weaker in presentation to the Court than the case in which all of the conspirators within the Court's jurisdiction are joined.

Having satisfied himself as to the law of the case and the propriety, desirability and utility of litigation, the plaintiff's lawyer is then confronted with the problem of formulating his pleadings. The particular difficulty with respect to antitrust cases arises from the often widespread, sprawling and diffuse character of the conduct complained of, the number of parties frequently involved, and the general complexity of the situation. There are cases which say that because of this character of the antitrust field, pleadings

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[34] *Dura Electric Lamp Co.* v. *Westinghouse*, 249 F. 2d 5 (C. A. 3rd Nov. 8, 1957).

[35] *Rector* v. *Warner Bros. Pictures*, 102 F. Supp. 263 (Cal. 1952).

in these cases must be more specific than in other cases.[36] Other cases suggest that because of the difficulty of specifying details in antitrust litigation, slightly greater liberality may apply to the interpretation of the pleadings.[37] Probably the correct view is that the same principles of pleading apply to antitrust cases as apply to any other cases, and that the adequacy of the pleadings must be judged in the light of the issues and of knowledge of the facts available to the parties.[38]

Even though pleadings may appear to be inadequate because indefinite, the proper remedy is use of the discovery process rather than motions to make more definite and certain which are no longer favored by the Federal courts.[39] General allegations of conspiracy have usually been held sufficient to satisfy the rules, without a statement of the circumstances from which the conclusion of conspiracy is drawn.[40] However, from the plaintiff's viewpoint, the practical and sensible course to follow seems to be to set out in logical, or chronological, sequence an outline of the entire case alleged by plaintiff, including as much detail as is reasonably available and as may be appropriate to make the pleading a convincing statement

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[36] *Bader* v. *Zurich G. A. & L. I. Co.*, 12 F. R. D. 437 (N. Y. 1952); *Baim & Blank, Inc.* v. *Warren-Connelly Co.*, 19 F. R. D. 108 (N. Y. 1956).

[37] *Louisiana Farmers Protective Union* v. *Great A. & P. Tea Co.*, 131 F. 2d 419, at 422 (C. A. 8th 1942); *Noerr Motor Freight* v. *Eastern R.R. Presidents Conference*, 113 F. Supp. 737, at 742 (Pa. 1953).

[38] *Nagler* v. *Admiral Corp.*, 248 F. 2d 319 (C. A. 2d 1957).

[39] *McCain* v. *Socony-Vacuum Oil Co.*, 64 F. Supp. 12 (Mo. 1945); also see *Cranston* v. *Baltimore & Ohio R.R.*, 16 F. R. D. 318 (Pa. 1954); *Boerstley* v. *American Medical Ass'n*, 16 F. R. D. 437 (Ill. 1954); *H. K. Porter Co.* v. *Bremer*, 11 F. R. D. 89 (Pa. 1951); *Jennings* v. *Fanti*, 11 F. R. D. 548 (Pa. 1951); *Armstrong Cork Co.* v. *Patterson-Sargent Co.*, 8 F. R. D. 215 (Ohio 1948); *Vecchia* v. *Fairchild Engine & A. Corp.*, 171 F. 2d 610 (C. A. 2d 1948); *Citrin* v. *Greater New York Industries*, 79 F. Supp. 692 (N. Y. 1948); *Smith* v. *Stark Trucking Inc.*, 53 F. Supp. 826 (Ohio 1953); *United States* v. *Association of American Railroads*, 4 F. R. D. 510, 535 (Neb. 1945); *Battin Amusement Co.* v. *Cocalis Amusement Co.*, 1 F. R. D. 769 (N. J. 1941); *Fleming* v. *Mason & Dixon Lines*, 42 F. Supp. 230 (Tenn. 1941); *Lee I. Robinson Hosiery Mills* v. *Jonas Shoppes*, 46 F. Supp. 653 (Pa. 1942).

[40] *Bethlehem Steel Co.* v. *Industrial Union*, 115 F. Supp. 231 (N. Y. 1953); *United States* v. *Association of American Railroads*, 4 F. R. D. 510, 527 (Neb. 1945); *United States* v. *Johns-Mansville*, 1 F. R. D. 548 (Ill. 1941); *Stewart-Warner Corp.* v. *Staley*, 42 F. Supp. 140 (Pa. 1941); also see *Barron & Holtzoff*, Federal Practice & Procedure, vol. 1, sec. 258, p. 453.

of plaintiff's case. It may also be useful to organize the complaint in the fashion which the government frequently employs, by setting out allegations under specific headings such as "Jurisdictions," "The Parties," "The Conspirators," and similar headings. Such a pleading will have the virtue of making clear to the Court what it is that the plaintiff's case is based upon, and of at least suggesting that the plaintiff's case is well founded. If such a complaint goes beyond the necessities of the rules and pleads evidence or draws conclusions, these will not be stricken if they are relevant and assist in clarifying the issues.[41]

At the time of pleading the plaintiff must also make his choice between a Court and a jury trial, since the demand for a jury trial must be made within ten days of the service of the last pleading.[42] As a practical procedure it is probably desirable for the plaintiff to make a demand for a jury trial in the complaint, so that there may be no question of it having been waived. The right to a jury trial may always be waived later, although it cannot be demanded later. Ordinarily, the defendant will acquiesce in the waiver of a jury trial, although usually a defendant will not agree to one if it has not been demanded. If a defendant is inclined to insist upon a jury trial he can, of course, secure it himself by making the demand, so nothing is lost by including a demand for a jury trial in the complaint.

As to whether or not the case should actually be tried before a Court or jury, there is much more doubt. My own inclination, and I think that of most antitrust lawyers, is to try antitrust cases before a Court without a jury whenever possible. The reasons for this are fairly obvious, and involve the complex and extensive character of the evidence that is usually offered, and the difficulty of securing the sustained and concentrated attention necessary to deal

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41 *Smith, Kline & French Lab.* v. *Eric Hill Co.*, 11 F. R. D. 290 (Ohio 1951); *Howitt* v. *St. John*, 9 F. R. D. 608 (Ohio 1949); *H. K. Porter Co.* v. *Bremer*, 11 F. R. D. 89 (Ohio 1950); *A. B. Dick Co.* v. *Marr*, 9 F. R. D. 99 (N. Y. 1949); *Citrin* v. *Greater New York Industries*, 79 F. Supp. 692 (N. Y. 1948); *Burke* v. *Mesta Machine Co.*, 5 F. R. D. 134 (Pa. 1946); *United States* v. *Association of American Railroads*, 4 F. R. D. 510, 527-8 (Neb. 1945); *Sinaiko Bros. C. & O. Co.* v. *Ethyl Gasoline Corp.*, 2 F. R. D. 305 (N. Y. 1942); *French* v. *French Paper Co.*, 1 F. R. D. 531 (Mich. 1941).

42 F. R. C. P., Rule 38.

with such evidence on the part of the jury. There are many considerations involved in making this choice, and it may well be that the determination must be made for each particular case in the light of the issues, the parties, and the character of the judges and juries likely to be encountered.

After the pleadings have been completed, the situation will usually be that plaintiffs have alleged all of the elements constituting a number of violations of the antitrust laws, together with damages to the plaintiff in an amount several times greater than the plaintiff is likely to be able plausibly to support. On the other hand, the defendants will ordinarily have admitted their corporate name and existence, and possibly their office address, but have denied all of the other allegations of the complaint. In order to avoid the intolerable burden of attempting to litigate and prove every minute detail involved in such a proceeding, it is not only desirable but absolutely necessary to define the issues considerably more closely than is required in the pleadings. The proper method of doing this, of course, is through use of the instruments of discovery. These permit each party to gain a fairly extensive knowledge both of the other party's evidence and of his position, and to have the issues sharpened reasonably well before trial. Interrogatories may properly be used both to ascertain facts and evidence in the other party's possession, and also to securing commitments as to the adverse party's position and contentions.[43] Requests for admissions may serve a similar purpose although they are less useful because less flexible generally. Examination of adverse parties or witnesses on deposition may also serve a similar purpose although this is more expensive, both in time and money. The issues may also be defined by a pre-trial conference which may be demanded by either party.[44] The report of the Judicial Conference of the United States on procedure in antitrust cases suggests that pre-trial

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[43] *Broadway & Ninety-Sixth St. Realty Co.* v. *Lowe's, Inc.*, 21 F. R. D. 347 (N. Y. 1958); *Curtis* v. *Loew's, Inc.*, 20 F. R. D. 444 (N. J. 1957); *Caldwell-Clements, Inc.* v. *McGraw-Hill Pub. Co.*, 12 F. R. D. 531 (N. Y. 1952); *Webster Motor Car Co.* v. *Packard Motor Car Co.*, 16 F. R. D. 350 (D. C. 1950); *Bowles* v. *Safeway Stores*, 4 F. R. D. 469 (Mo. 1945); *Nelson* v. *Reid*, 4 F. R. D. 199 (Fla. 1944); *Schwartz* v. *Howard Hosiery Co.*, 27 F. Supp. 443 (Pa. 1939); 18 Hughes Fed. Pract. 183, sec. 22,652.

[44] F. R. C. P., Rule 16.

conferences between trial judge and counsel should be informal, and that these conferences "may be prolonged and repeated."[45] Although this report suggests that a formal conference in open court with counsel at counsel table and judge on the bench is not effective, my experience has been to the contrary. Probably the effectiveness of any pre-trial procedure, whether formal or informal, depends largely upon the judge who is conducting the proceedings.

One point that deserves emphasis and is not often mentioned, is that one of the best ways of defining the issues in any case is by thorough preparation. There is no doubt that admissions by the adverse party, and the elimination of a contest over certain facts will much simplify the task of the lawyer in preparing his case. However, a thorough and skeptical interrogation of all friendly witnesses, together with the utilization of all available discovery procedures, is likely to put the lawyer for either side in the possession of sufficient facts to indicate what the issues are going to be.

Probably the most important single function of the plaintiff's lawyer in a private antitrust case is that of securing the evidence which will enable him to establish the case upon trial. Again the first step in securing such evidence is the thorough examination of all friendly witnesses and all documents available from the plaintiff or his associates.

Another source of evidence may be government cases previously brought against the same defendants. The statutes provide that a final judgment or decree in any civil or criminal proceeding by the United States under the antitrust laws finding that a defendant has violated such laws is prima facie evidence against that defendant in any private suit as to all matters respecting which the judgment would be an estoppel as between the parties to the government suit.[46] The statute by its own terms does not apply to consent decrees entered before any testimony has been taken; and it has been held not to apply to F. T. C. orders.[47] The Supreme Court has said that in determining the evidentiary scope of such judgments the Court must look at the record upon which the judgment was

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[45] Procedure in Antitrust and Other Protracted Cases, 13 F. R. D. 62, at 68 (1951).

[46] 15 U. S. Code sec. 16.

[47] *Proper* v. *John Bene & Sons,* 295 F. 729 (D. Ct., N. Y. 1923).

based.[48] Furthermore, it may be found that the records of cases involving government prosecutions of defendants are useful sources of evidence independently of this statute. Sometimes references are made to facts which can be independently established by interrogatories or requests for admissions. There may be references to documents which can be secured or to witnesses who can be interrogated. Also there may be testimony in the government cases by witnesses friendly to the defendants which will be useful to plaintiff's counsel in cross-examining such witnesses if they are called in his own case. Thus, even though orders of the F. T. C. and particular evidence or testimony in government cases may not be admissible as primary evidence in proof of plaintiff's case, all of such material is useful as furnishing both background data and leads to plaintiff's counsel, and also as potentially impeaching material.

The discovery procedures of interrogatories, requests for admissions, and examination of adverse witnesses on deposition are, of course, standard and useful methods of securing evidence in the preparation of any antitrust case. But perhaps the most important single method of securing evidence from an adverse party in an antitrust proceeding is founded upon the old Department of Justice practice of the "file search." By a motion for inspection under Rule 34, either party may ordinarily secure access to the relevant files and books of the adverse party. These may be limited in scope or they may be very voluminous. In any antitrust case in which the business conduct of the parties over a period of time is at issue, it seems to me that it is well worth the time of plaintiff's counsel to make a personal inspection of the relevant files of the defendants. Even though this may be a time-consuming and laborious task, there is no other way in which counsel can secure as good an insight into the business methods and character of the defendant, and in effect see the defendant with his defenses down. Furthermore, in many cases this has proved to be the richest source of evidence against defendants. The memories of even the most conscientious parties are likely to forget or blur incriminating facts unless these facts have been recorded in memoranda or other documents which are available to or have been discovered by adverse counsel. Therefore, a thorough inspection of the files and books of the adverse

48 *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951).

party not only is likely to furnish primary evidence, but may also put some limits on the flexibility of recollection when the time comes for the party to testify.

Inspection, like the other discovery techniques, is, of course, a weapon that works equally well for both parties. Defendants are not so likely to be interested in the plaintiff's files as they are in his books, for the reason that the fact or amount of damages is likely to be supported or refuted by the evidence from the books. It is sometimes the case that each party demands inspection of the other party's files and books, and each resists inspection of his own. It seems to me that there is a trend among sophisticated antitrust lawyers today to assume that Courts will permit and order cross-inspections and to sit down and work out the scope of the inspection orders between themselves.

From the viewpoint of the plaintiff, I think that it is desirable not only to inspect the defendant's files and books, but that it is advantageous to have the defendant inspect the plaintiff's books. There is sound reason for this. Plaintiff will ordinarily want to offer summaries of the data contained in his books as part of his evidence. Indeed, it is difficult to imagine an antitrust case in which plaintiff will not wish to utilize evidence drawn from his own business records to some extent. The evidentiary use of such summaries will be greatly facilitated if the defendants have previously had an opportunity to inspect the plaintiff's books. If plaintiff puts an accountant on the stand to testify to balance sheets or operating statements, and if the defendants have not previously examined his books, much time may be wasted in cross-examination as to details, and the net effect may be to create doubt in the Court's mind as to the accuracy of plaintiff's figures. On the other hand, if defendants have examined plaintiff's books to their heart's content prior to trial, this may altogether eliminate such cross-examination, and the parties will probably be able to agree upon the figures that accurately represent the books. Therefore, from the plaintiff's viewpoint in an antitrust case, I think that cross-inspection should be welcomed, and that plaintiff's counsel should be anxious to work out broad cross-inspection orders.

It has been noted in recent considerations of the problem that various pre-trial arrangements are almost indispensable in antitrust

cases of the usual magnitude.[49] The pre-trial arrangements ordinarily should be made either by way of orders entered by the Court, usually at pre-trial conferences, or by way of stipulations between the parties. These orders or stipulations are likely to involve almost any aspect of the trial, including the scope of issues and the number of witnesses. However, the most common subject and the one as to which there usually is the greatest difficulty, relates to the matter of documentary exhibits. Because of the character of the issues, as well as the frailty of human memory, documentary evidence is commonly more important in antitrust cases than in other types of litigation. Furthermore, the documents are likely to become so numerous and voluminous that a trial will be very nearly interminable unless some prior arrangements have been made. The report of the Judicial Conference recommends that the parties be compelled to exchange exhibits prior to trial.[50] Where the exhibits consist largely of documents taken from the files of the adverse parties, this may not be so significant, but in this case it will serve the same purpose if each side furnishes the other with a list of the documents that will or may be called for, or may be used as evidence.

Another device that is likely to be of great value in saving the time of Court and counsel without prejudicing anyone, is the stipulation of a means for laying or waiving the foundation for documents that are to be offered at the trial. Where documentary exhibits run into the hundreds, it can take an utterly exorbitant amount of time if the ordinary foundation is required to be laid for each one as it is offered. On the other hand, ordinarily the documents will be of a few classes known to the parties in advance, and the authenticity of which is not challenged. Thus an enormous saving of time and effort will result from a stipulation, the effect of which is to provide that lists of proposed documentary exhibits shall be exchanged prior to trial, and that no foundation need be

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49 McAllister, The Big Case: Procedural Problems in Antitrust Litigation, 64 Harv. L. R. 27 (1950); Yankwich, "Short Cuts" in Long Cases, 13 F. R. D. 41 (1952); Procedure in Antitrust and Other Protracted Cases, 13 F. R. D. 62 (1951), and references cited therein. Also see Demonstration of Pre-Trial Procedure in An Antitrust Case Involving Patent Issues, 13 F. R. D. 207.

50 Procedure in Antitrust and Other Protracted Cases, 13 F. R. D. 62, at 69 (1951). For a suggestive form of stipulation, see 22 F. R. D. 169 (1958).

laid for those that are not specifically challenged on some substantial ground by one of the parties.

An indispensable part of preparing a plaintiff's case for trial consists of the preparation of the trial brief. By this I do not refer to the document that is sometimes handed to the Court in advance of trial. If the Court requires such a trial brief it, of course, must be furnished in the form that the Court requires. However, by a trial brief what I refer to is an elaborate cross-index for use by plaintiff's counsel during the trial referring to all potential documents, witnesses and facts in such fashion that counsel can readily ascertain during the trial where to find the evidence that he may want at a given moment. What form this should take will depend upon the individual preference of the lawyer. I have found that a very large loose-leaf notebook serves well. In such a trial brief I have headings for each of the parties, as well as separate headings for exhibits, pleadings, notes on witnesses, notes on cross-examination, and rebuttal notes. I do not include any law in this trial brief, but have separate memoranda or notes on legal points that are thought likely to arise. As the trial progresses, I take notes on the testimony of the witnesses on blank pages in this notebook, and make notes under cross-examination or rebuttal headings where appropriate. I attempt to have a complete list of all documents that appear to have any importance and have been inspected from the files of any of the parties under the heading for each of the parties, together with a very brief summary of the document. The documents that are to be introduced in evidence are again listed with a cross-reference under the headings of exhibits, and brief summaries are also contained under this listing. The total number of documents listed and summarized in such a trial brief may be two or three times the total number that are finally introduced in evidence. However, the information contained in this cross-referenced listing of documents may prove to be invaluable on a vital point in the cross-examination of any given witness.

Parts of the trial brief are, of course, handwritten entries made either during the course of the trial or during preparation. Most of the detailed listing and cross-indexing of documents is done prior to the trial, and is typed out for insertion in the trial notebook before the trial begins. As to this material, I have a carbon copy made for the benefit of my associate or co-counsel, and we attempt to

keep track of exhibit numbers and references in the record to documents on this list as exhibits are introduced or references are made.

From what has been said, it will be evident that in my viewpoint the proper preparation of a plaintiff's antitrust case really does not differ much from the preparation of a defendant's case. If there is little difference in the preparation, I think there is even less difference in the trial.

Having prepared the trial brief, the first trial problem that arises is the number of counsel to participate, and the role they are to play. This is a problem that is peculiar to antitrust actions because of the number of parties ordinarily involved. It is more likely to be a problem for defendants than for plaintiffs, although under the rules permitting joinder by similarly situated parties this may become a practical problem for plaintiffs also.[51] There are no rules that can be laid down nor even any useful precedents as to the proper or best procedure with respect to the number and role of counsel participating in a trial. However, if I may hazard an opinion, it seems to me that regardless of the number of parties involved, a trial is most effectively conducted when there is one chief counsel on each side primarily responsible for the conduct of the trial and the examination and cross-examination of witnesses. It should also be added that an antitrust trial is likely to be sufficiently complex so that it is very difficult for one lawyer by himself to handle all of the incidents of trial even where there is only a single party represented. Therefore, it is very helpful to have associate counsel during the course of an antitrust trial. It is desirable to have the role of the several counsel determined beforehand so that one has primary responsibility for keeping track of documents and exhibits, another for securing the attendance of witnesses, and so forth.

The practice of lawyers with respect to the making of opening statements seems to vary. However, again as a matter of personal observation, it would appear that the more complicated and involved the case is the more useful an opening statement is likely to be. In an opening statement counsel has the opportunity to

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[51] F. R. C. P., Rule 20. See, e.g., *Kainz* v. *Anheuser-Busch*, 104 F. 2d 737 (C. A. 7th 1952) cert. den. 344 U. S. 820; *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (C. A. 7th 1941); *Farmers Co-op Oil Co.* v. *Socony-Vacuum Oil Co.*, 133 F. 2d 101 (C. A. 8th 1942); *Rohlfing* v. *Cat's Paw Rubber Co.*, 99 F. Supp. 886 (Ill. 1951).

present to the Court or the jury his version of the testimony unfettered by the lapses, forgetfulness and mis-statements of witnesses. Therefore, if counsel cannot persuade the tribunal of the correctness of his cause in an opening statement, there would seem little likelihood that he will be able to prevail upon trial. Needless to say, the opening statement should be organized so as to give the trier of fact a view of the entire case and the framework into which the evidence may later be fitted as it is presented in a somewhat less organized fashion.

One of the principal problems in antitrust trials is always that of handling documents. This problem will be considerably minimized if appropriate pre-trial arrangements have been made for offering and introducing documentary exhibits. Probably the best method of handling this task is to have prepared typewritten copies of lists of the documents that are to be introduced in evidence, grouped according to subject matter, so that those which are to be offered at one time or in relation to one another appear on the same list. Copies of these lists may be offered to both the Court and adverse counsel at the time of introduction. Counsel should be prepared to state the significance of proposed exhibits at the time of the offering them, and to refer to the relevant portions of the contents. It has been recommended that the trial judge should refuse to admit exhibits in these cases that are unsorted and unclassified by the party offering them.[52]

With respect to voluminous books and documents, it is permissible to offer in evidence merely summaries of the significant parts or of the contents of the records, as by the presentation of an accountant's statement prepared on the basis of the financial records of a business, and such summaries are admissible.[53] In all such cases, however, the original documents from which the summaries have been prepared must be made available for inspection by the adverse party either in the courtroom or at some other place agreed

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[52] Procedure in Antitrust and Other Protracted Cases, 13 F. R. D. 62, at 74 *et seq.* (1951).

[53] *American Vitrified Products Co.* v. *Wyer*, 221 F. 2d 447 (C. A. 7th 1955); *New Amsterdam Cas. Co.* v. *W. D. Felder & Co.*, 214 F. 2d 825 (C. A. 5th 1954); *Minnehaha County* v. *Kelley*, 150 F. 2d 356 (C. A. 8th 1945); *United States* v. *Mortimer*, 118 F. 2d 266 (C. A. 2d 1941); Procedure in Antitrust and Other Protracted Cases, 13 F. R. D. 62, at 77-78.

to by the parties or designated by the Court. In this connection, an interesting question is whether or not the Court has the right during the course of trial to order the production of documents, either for discovery or for use in examination or cross-examination, under Rule 34. While some Courts have suggested that this rule applies only to pre-trial procedure, and that the Court cannot, therefore, act under it after trial has begun,[54] the better rule would appear to be that the Court may, in its discretion, and at any time before or during the trial, order the production or disclosure of documents relevant to the issues.[55]

Most of the discussion concerning the use of material disclosed by the discovery procedure relates to the scope of discovery. However, answers to interrogatories, responses to requests for admissions, and depositions present something of a problem to the lawyer who wishes to use them as part of his proof at the trial. It seems clear that none of the information secured through discovery procedures constitutes evidence in itself until it is offered and received as part of the record at the trial.[56] Therefore, any such data which counsel desires to rely upon must be specifically incorporated into the record at the time of trial. The use that may be made of depositions is specified in Rule 26. Subject to the rules stated, depositions apparently may be used either by specific reference to witness, page and line of the parts that are to be incorporated by reference, or, preferably by reading into the record the part that is actually to be incorporated. Simply from the viewpoint of stimulating interest and of presenting deposition evidence in a comprehensible fashion, a good technique for presenting such testimony is to have one person, perhaps one of counsel, take the part of the witness

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54 *United States* v. *American Optical Co.*, 2 F. R. D. 534 (N. Y. 1942); *Societe Internationale, etc.* v. *McGranery*, 14 F. R. D. 44 (D. C. 1953), mod. on other grounds 225 F. 2d 532, cert. den. 350 U. S. 937, reh. den. 350 U. S. 976.

55 *Bank of America* v. *Haydlen*, 231 F. 2d 595 (C. A. 9th 1956); *United States* v. *E. I. Du Pont de Nemours & Co.*, 11 F. R. D. 583 (Del. 1951); cf. *Lauritzen* v. *Atlantic Greyhound Corp.*, 8 F. R. D. 237 (Tenn. 1948); *C. F. Simonin's Sons* v. *American Can Co.*, 24 F. Supp. 765 (Pa. 1938).

56 *Haskell Plumbing & Heating Co.* v. *Weeks*, 237 F. 2d 263 (C. A. 9th 1956); *United States* v. *Smith*, 95 F. Supp. 622 (Pa. 1951); *Bowles* v. *Keller Glove Mfg. Co.*, 4 F. R. D. 450 (Pa. 1945); *Patterson Oil Terminals* v. *Charles Kurz & Co.*, 7 F. R. D. 250 (Pa. 1947); *Bailey* v. *New England Mut. Life Ins. Co.*, 1 F. R. D. 494 (Cal. 1940); *Rice* v. *United Air Lines*, 10 F. R. D. 161 (Ohio 1950).

and read the answers from the deposition while the other counsel reads the questions. Similarly, interrogatories and the answers to interrogatories, and requests for admissions and responses thereto constitute admissions of the adverse party and may be used as such, but they must be incorporated into the record either by introduction physically as numbered exhibits or by being read into the transcript of the trial.

A number of other problems more or less unique to antitrust cases are frequently presented by trial. Without discussing all of them, I will mention only one. The question of whether or not daily transcript is required is usually a problem chiefly for the plaintiff because of the cost involved. Obviously it is desirable to have daily transcript if one can afford it. On the other hand, it seems to me that if the case has been adequately prepared, and if careful notes are kept during the course of the trial, the importance of daily transcript is diminished.

Another interesting question sometimes arising is as to the scope of permissible cross-examination by various parties where they are separately represented but represent essentially similar interests. About the only rule that can safely by stated on this is that the matter lies almost wholly within the discretion of the Court, and that the Court may permit or limit cross-examination within wide limits as seems appropriate in the particular case.

With respect to briefs, only a word need be said. A case will ordinarily be briefed in the trial court only where it has been tried to the Court rather than the jury. In such event it may be assumed that there will be some lapse of time between the presentation of the evidence and the decision of the case by the Court. It thus becomes unusually important for the briefs to be helpful to the Court in summarizing and organizing the evidence in the record. It goes without saying that such effort will be most effective in a great majority of cases if meticulous care is taken to state the evidence accurately, and to cite the record for each fact asserted. A well organized brief will not only assist the Court and tend to secure a favorable decision, but will be of great help to counsel if he is fortunate enough to be called upon to prepare findings.

In closing I should like to add only a word as to the role of private action in antitrust enforcement. It is clear that the number of private antitrust actions has increased enormously during the

past several decades and apparently is continuing to increase.[57] Those who are usually called upon to appear for defendants in such cases are likely to deprecate such a trend despite the fact that this represents not unattractive business. However, it is my view that if we start from the assumption that the antitrust laws are socially desirable and should be enforced, we are bound to come to the conclusion that, whatever the merits of any particular action, enforcement of these laws by private suit is generally more desirable than enforcement by government action although not a substitute for it.[58] This is true for a number of reasons. First, private action gives a kind of automatic enforcement that does not require the vast army of government agents that would otherwise be necessary to achieve the same result. Second, private action has less tendency to involve an authoritarian centralization of power in an enforcement agency. Third, private action is more directly remedial with respect to the injury to competitors that may have been done than is government action. And, finally, private action with the possibility of substantial financial liability may be a more effective deterrent than possibility of any government suit.

It has been suggested that the lure of treble damages plus the recovery of attorneys' fees may cause the right of private antitrust action to be abused. That there may be abuses in this field, as well as in any other, cannot be denied. However, it seems unlikely that such abuses will be socially significant. The difficulties in the way of plaintiff's recovery in a private antitrust suit are so great that no competent lawyer who has any knowledge of the field will ordinarily bring an action unless he is well assured that the evidence is likely to justify litigation and give him a better than even chance to prevail. The record of private antitrust litigation is one that shows a remarkably low precentage of victories for plaintiffs, and a far lower proportion of plaintiffs' judgments than

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[57] Report of the Attorney General's National Committee to Study the Antitrust Laws, 378 (1955); Annual Report of the Judicial Conference by Warren Olney, III, Director of Administrative Office of U. S. Courts, 27 L. W. 2154 (Sept. 30, 1958).

[58] See Loevinger, Private Action—The Strongest Pillar of Antitrust, 3 Antitrust Bull. 167 (1958); Loevinger, Enforcement of Robinson-Patman Act by Private Parties, 1957 Antitrust Law Symposium (CCH) 145, at 162; cf. *Leh* v. *General Petroleum Corp.*, 27 L. W. 2141 (Cal. Sept. 15, 1958).

would appear to be justified by known business history and the apparent facts of the reported cases.

In any event, whatever one's personal opinions may be, antitrust lawyers must recognize that Congressional policy now and in the foreseeable future not only favors strong enforcement of the antitrust laws, but also favors aid to plaintiffs in private suits under those laws. The recent action of Congress in providing for more favorable tax treatment of antitrust recoveries may illustrate the trend. It seems likely that the next Congress will see a determined effort to declare Section 3 of the Robinson-Patman Act to be part of the antitrust laws for purposes of private suit, and, if the Supreme Court should sustain the 9th Circuit in the *Klor's* case, Congress is likely to declare that an injury to one competitor by a violation of the law is a public injury authorizing private remedial action.

There can be little doubt that private damage suits under the antitrust laws will be with us for many years, and will continue to increase in importance as a class of litigation. Basically, the principles of handling such lawsuits are the same as those involving the successful handling of any other type of litigation. Success in any lawsuit, as every lawyer knows, depends far more on the work done before the suit commences than on the brilliance of counsel in the courtroom. Since antitrust suits differ from other suits principally in calling for a larger investment in time, effort and money, and in offering larger potential recoveries, the principles applicable to handling of plaintiffs' cases in this field are simply increased emphasis upon the principles applicable to cases in other fields and to defendants' cases. If they can be stated summarily, they are probably these: Caution and conservatism in counseling litigation; thoroughness, diligence and organization in preparing for trial; candor before the Court; and a study of all phases of antitrust law, evidence, trial, procedure, economics, and every other related field of human knowledge at all times during the preparation, trial and of the briefing of the case. Basically the matter is very simple: all an antitrust lawyer needs for success is a large staff, infinite energy and omniscience!

ECONOMIC ANALYSIS IN ANTITRUST ENFORCEMENT

by

E. T. Grether*

To begin with, I wish to express appreciation for the invitation to meet with the members of the Antitrust Section of the Illinois Bar. Two years ago I was with you as a guest and listener. This time, unfortunately for my own enjoyment, I must sing for my supper. I realize that your interest in the topic assigned to me is not merely general and academic but arises out of the report on this subject which Professor Carl Kaysen of Harvard and I presented to the Antitrust Division of the Department of Justice a year ago as a special consulting project. Some of you undoubtedly saw the news story about this report in *The Wall Street Journal,* June 27, 1958. This story was based upon an official release by the Department of Justice of a very brief summary and one of the annexes to the report. Judge Victor R. Hansen, quite appropriately, felt that the full report should not be released because much of it dealt with internal personnel, organization, policies and procedures, as well as the general issue of the use of economic analysis.

It is particularly appropriate to discuss this topic here in Chicago because there were some discussions of this issue in the sessions which I attended here two years ago, especially in connection with the exceedingly interesting debate on the *DuPont Cellophane* case in which economic analysis played such an important role.

The Wall Street Journal story, based as it was, upon an official release, was accurate so far as it went. Reportorial headlines, subheads and a quotation from an unnamed Department of Justice official however, did place our study in somewhat distorted perspective. I am glad, therefore, to have the opportunity to state clearly and emphatically that we did not recommend that "a host of economists . . . join with lawyers in preparing court attacks" in a "dice 'em and slice 'em policy." Doubling, tripling, or quadrupling the present small staff of economists in the Antitrust Division could by no stretch of the imagination produce a "host." At one time in the history of the Antitrust Division it was forbidden to use

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economists as such. Some of my lawyer friends in private practice still would support a *per se* prohibition of the use of economists in antitrust enforcement. I am sure that there are persons here this evening who recall the debate on this issue before the Attorney General's National Committee to Study the Antitrust Laws. There were those who had strong doubts about our dangerous dogmas, even though we were outnumbered and outflanked in this galaxy of legal talent.

Most likely there are some persons here this evening also who roared with laughter at a meeting of the Section on Antitrust Law of the New York State Bar Association, January 27, 1954, when Thurlaw M. Gordon put economists in their place in his talk "Walking Backwards Into the Future." After stating that "the antitrust laws are in a state of utter and complete confusion" [1] he held that "the economists are the focal root of the infection." "They are the metaphysicians who have given the enforcing authorities all of their funny ideas. They remind me of the old limerick:

A metaphysician of Boston
A painful dilemma was tossed on–
As to whether 'twere best
To be rich in the West–
Or poor–but peculiar–in Boston."

In terms of this limerick I must live in the worst of the two worlds for I'm not only "in the West" but "poor and peculiar." Things are even worse than this, in terms of Thurlow Gordon's characterization. After castigating economists, he paid "tribute to the work of the Graduate Schools of Business Administration . . . They have a lively and realistic understanding of the world we live in." Well–I am both a Professor of Economics and Dean of a Graduate School of Business Administration! I mention this because it is relevant to a brief comment at the end of my paper.

It is difficult to find a reputable economist in this country who has not been asked to participate in antitrust suits especially on the private side. But to be sure, economists in the private cases as on the government's side, are chiefly handmaidens of the lawyers.

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[1] T. M. Gordon "Walking Backward Into the Future," in *How to Comply With The Antitrust Laws*, CCH, Inc., 1954, p. 49.

Albeit, a bit high priced as handmaidens should be! Antitrust has been the lawyer's domain! Antitrust lawyers tend still to think of economists as possible expert witnesses in antitrust cases, not as equals on a team or even as advisers or as statistical clerks. But twenty or more years ago lawyers and courts were beginning to learn the new economic vocabulary and analysis of oligopoly or competition among the few, which was providing illumination to the most difficult area of antitrust policy.

The mention of "oligopoly" leads me to state that my remarks this evening will be directed almost entirely to the enforcement problems in the area of concentrated industry or the so-called "big cases." To set the record straight, I wish to state clearly also, that we did not propose a "dice 'em and slice 'em" policy, as alleged in the *Wall Street Journal* story. Carl Kaysen and I suspected that there may have been *relatively* an overemphasis on the simple *per se* types of violations in antitrust enforcement (i.e. price-fixing and market sharing agreements, collective boycotts, and organized exclusionary devices). A survey of the entire antitrust record by Professor Joe S. Bain supported this presumption. This observation, however, should not be taken as suggesting any weakening of enforcement in the simple conduct area but rather an increase in the attention given to the much more complicated area of the so-called "big" cases.

My thesis this evening is simply that antitrust activity on both the public and private sides needs more and better, not less, economic evidence and analysis. But there must be significant improvement in two directions in the use of economic analysis. First, the facts and data need to be collected and presented in a more systematic, analytical framework. Second, within this framework we need a much more realistic knowledge and grasp of the nature of business decision making, policies, strategies, and behavior.

Now it would be possible to take off from these two observations on an extended *ex parte* rationalization of the role of economists in antitrust work, public and private. An attorney located in my own area has alleged that I am trying to make work for my "bright boys." May I reassure you that such is not my intent and furthermore, I have no illusions concerning the rate of short run increase of economic analysis in antitrust work. All of us know, of course, that progress in law and regulation almost invariably must be slow

and piece-meal and to some extent regardless of ultimate logic. So first let's see where we are now in the use of economic analysis in antitrust as evidenced in recent court cases. Following this review, it may be useful to take a brief look into the near and long-term future.

Fortunately, Annex II of our Report, dealing with "Economic Evidence in Recent Antitrust Cases" was released by the Department of Justice.[2]

Thirteen recent antitrust cases or collections of cases were examined "in order to see what role economic evidence played in determining the decisions of the judges. Briefs and records (though only Records on Appeal) were studied as well as opinions, so as to see how judges chose among the evidence and arguments which were offered. The cases selected include the important recent Sherman Act cases (and two Trade Commission cases) in which questions of market facts and their significance appeared to play a more important role than questions of wrongful conduct as more traditionally defined.[3]

The economic facts and concepts with which the courts dealt were classified under four heads: (1) market definition and market share, (2) price behavior, (3) profits, and (4) miscellaneous elements of market performance.[4]

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[2] Annex II was prepared by Professor Carl Kaysen with the assistance of Mr. George Hall, both of Harvard University.

[3] The cases examined were:

Cellophane, 118 F. Supp. 41; 351 U. S. 377;
Kobe Pump, 97 F. Supp. 342; 198 F. 2d 416;
Hughes v. *Cole*, 113 F. Supp. 519; *Hughes* v. *Conaghan*, 113 F. Supp. 527; *Hughes* v. *Ford*, 114 F. Supp. 525 and 215 F. 2d 924;
Columbia Steel, 334 U. S. 495;
Besser, 96 F. Supp. 304; 343 U. S. 444;
Alcoa, 148 F. 2d 416, 91 F. Supp. 333;
Times Picayune, 345 U. S. 594;
Paramount, 66 F. Supp. 323; 334 U. S. 131;
American Crystal Sugar, 143 F. Supp. 100;
American Tobacco, 147 F. 2d 93, 328 U. S. 781;
Morton Salt, 235 F. 2d 573;
Tag Institute, 174 F. 2d 425;
Allied Paper, 168 F. 2d 200.

[4] The discussion to follow will be taken verbatim from or will paraphrase portions of the full statements of Kaysen and Hall.

Market Definition and Market Share: As was to be expected, the courts gave a great deal of attention to the definition and determination of the market, especially in giving meaning to the phrase "part of commerce" allegedly monopolized, under Section 2. In several cases the courts have affirmed that in Section 2 Sherman Act proceedings this is primarily a matter of economics. The review of only five cases will be reproduced here.

Cellophane and Kobe Pump Cases: Judge Leahy in the *Cellophane* case[5] directly dealt with the use of economic criteria in deciding market limits. Counsel for DuPont presented a long analysis of what he held to be the correct economic factors applicable to the definition of the market for cellophane. He ended with an appeal to the Court to consider the offered evidence regarding cellophane substitutes.[6]

"The Government contended that 'the facts that the defendant desires to prove are entirely against the express intent of Congress where they said "in any line of commerce."' Counsel continued that '. . . there (has) been a single product in a line of commerce and substitutes have been disregarded again and again.'"[7]

The Government felt the issue was:

> . . . the means by which the conclusion regarding market power and the definition of the market is reached. In other words, are we to wade through this great mass of detail, . . . the statistics and the trivia that was dumped in with it only to learn in the end what should be so obvious at the moment that the whole thing is futile.[8]

"Judge Leahy explicitly rejected this in his fifth trial memorandum and based his decision as to the cellophane market on economic grounds, i.e. possible substitutes. This was the position of DuPont, which presented many exhibits and witnesses to the effect that packagers shifted between cellophane and various other different types of wrappings. Most of this evidence was technical;

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5 351 U. S. 377, 118 F. Supp. 41.

6 351 U. S. 377 Record, 1544.

7 351 U. S. 377 Record, 1546-1547.

8 351 U. S. 377 Record, 1545.

DuPont presented cost studies, articles from trade publications, and engineering reports regarding substitution of wrapping materials.

"The Government held to the position that cellophane was a line of commerce and monopolization of cellophane violated Section 2. They also tried to show by a series of letters, intra-company reports, etc. that officials of DuPont had themselves viewed cellophane as occupying an independent market.

"The District Court decided that the correct market limits to use in measurement of DuPont's market power included all flexible wrapping,[9] relying substantially on the evidence and arguments offered by DuPont.

"On appeal, the majority of the Supreme Court endorsed the District Court's view of what constituted a proper market definition. The Government's Brief on Appeal contained a far clearer definition of the issues, and a far more persuasive analysis indicating that cellophane alone constituted the relevant market than was presented to the District Court. But only three Justices were sufficiently persuaded by it to hold that Judge Leahy had been wrong on this point. Even so, however, it might be said that the Brief gave relatively too much space to a discussion of previous cases, and too little to its (essentially correct) contentions that the great price differential between cellophane and the alleged close substitutes, and the ability of DuPont to change its prices independently of their price levels, and without provoking any corresponding change in their prices.

"Another instance where economic evidence was relied on by a court to delimit the market was the *Kobe Pump* case.[10] The suit was over patents held by Kobe. Dempsey charged that Kobe was guilty of violation of the Sherman Act. Kobe and Dempsey both manufactured hydraulic bottom pumps for oil wells. The court faced the issue as to whether the applicable market was limited to hydraulic pumps or included all oil well pumps.

"All parties were agreed that for shallow wells there were many types of pumps practicable, and for deep wells the hydraulic pump had many advantages. *Kobe Pump* argued for the broad definition and showed that there were deep wells that used sucker pumps. Kobe also presented an article by three engineers employed by an

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9 Finding 56, 351 U. S. 377 Record, 76.

10 *Kobe, Inc., et al.* v. *Dempsey Pump Co., et al.*, 97 F. Supp. 342, 198 F. 2d 416.

oil company showing relative costs of various types of pumps in deep wells.[11]

"The defendants argued that in deep wells the cost advantage of hydraulic pumps was so great that it really was a separate market. The District Court agreed and held that below 8,000 feet hydraulic pumps had few substitutes.[12] This decision resulted in a definition of the market such that Kobe had an overwhelming share.

"The question was reargued at great length in the briefs presented to the Appeals Court. Kobe Pump argued that only 1 per cent of the total oil wells were 'deep wells' and of 5,500 deep wells, only 1,105 were on artificial lift and only part of these used hydraulic pumps. This, Kobe concluded, could not be construed as a substantial part of commerce.[13]

"Kobe also argued that to so define the market would be to say that '*any* product with *any* differentiation' was a line of commerce.

"The Circuit Court upheld the District Court on its definition of the market. It held that the Sherman Act does not require that an entire industry need be monopolized before action can be taken, but only that an appreciable part be monopolized, and the hydraulic pump business was an 'appreciable' part.[14]

"At first glance, it would seem that this decision conflicts with that in *Cellophane:* in the one, substitutes were excluded; in the other, included. But in both cases, the Courts in fact used the same approach. Both courts studied a great deal of market and technical data in order to determine whether the economics of the industry required a market definition including several differentiated products or excluding them."

Columbia Steel: "*Columbia Steel* again provides an example of a case in which the market limits were determined on the basis of economic relationships.[15] It is noteworthy also because the Courts decried the lack of data. The issue was two-pronged: first, what

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11 198 F. 2d 416 R 670 PX 78.

12 R. 666.

13 Brief of Appellants, 10th CCA, p. 34.

14 98 F. 2d at page 416.

15 *U. S.* v. *Columbia Steel Co., et al.*, 334 U. S. 495.

products should be included in the market and, second, what was the correct geographical market area?

"The facts were clear and undisputed. Columbia Steel, a U. S. Steel subsidiary, purchased Consolidated Steel Co. of Los Angeles to serve as an outlet for steel from the Geneva, Utah, plant. Consolidated was the largest independent (non-integrated) steel fabricator on the West Coast. The Government charged the sale violated the Sherman Act because (1) it would eliminate competition between U. S. Steel and Consolidated, and (2) it would block off Consolidated as a market for other steel producers.[16]

"In regard to the geographical market, the Government defined a 'Consolidated market' which included 11 western states in which Consolidated sold. However, the Government did not present enough data to dispel doubt about the correctness of this area for measuring competition. The District Court, for example, used a national market for comparison in findings 10 and 11 of the opinion and in other findings used the 11-state area.[17] In no place in the District Court's opinion is there an exact statement of what the Court believed to be the correct area of competition, although the Supreme Court 'read the record' to the effect that Judge Rodney held that the 11-state area was correct. The Supreme Court criticized as inadequate the Government's data on sales in the 11 western states, although in the end the Court accepted that area as the appropriate one.[18]

"The other aspect of market definition was the problem of what were the relevant products comprised in the market. The Government viewed Consolidated as having two products in competition with U. S. Steel, fabricated structural steel products and pipe. They also contended that acquisition of Consolidated would lessen competition in rolled steel products, by cutting off Consolidated as an outlet for other steel producers' sales of rolled steel products.[19]

"In regard to the market for structural steel products, to what extent were Consolidated and U. S. Steel competitors? The District

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16 Appeal Brief for United States, pp. 14-27.

17 U. S. 495, R. 36-37.

18 334 U. S. at page 511.

19 Appeal Brief for United States, pp. 14-27.

Court resolved the question by comparing the number of jobs where U. S. Steel and Consolidated both submitted bids. The Court concluded 'of 8,620 bids made by one or both of the companies, there were only 166, or less than 2 per cent bid on by both.' [20]

"The Supreme Court took a more direct approach. The Court noted the steel companies' claim that U. S. Steel did heavy fabrication and Consolidated light and medium fabrication, and remarked on the 'elaborate statistical analysis' of bids submitted by the two companies. The Court dismissed the lack of rivalry on bids as not conclusive of lack of competition, but then said: '(The) government has introduced very little evidence, however, to show that in fact the types of structural steel products sold by Consolidated are similar to those sold by United States Steel.' [21]

"Due to this lack of economic data, the Supreme Court accepted the trial court's finding that there was not substantial competition between the two firms. This was the keystone in the final decision in favor of the steel companies.

"It is instructive to compare the way the courts handled the structural steel market with the way they handled the market for pipe. U. S. Steel made extruded pipe and Consolidated made welded pipe. The steel companies claimed that there were functional differences between these two types that made them non-competitive.

"The Government claimed that both competed in the same market and offered evidence of cases where both companies bid on the same pipe job. The steel companies replied that these instances were due to abnormal postwar shortages when consumers had to take anything they could get.[22]

"The District Court reviewed the structural characteristics of the two types of pipe and held them non-competitive.[23] The Supreme Court went into the pipe market to a greater extent, complained that 'the record is barren on the comparative production between Consolidated and its competitors, other than United States Steel, in the manufacture of large pipe.' [24]

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[20] R. p. 58.

[21] 334 U. S. at 515-516.

[22] Appeal Brief for Columbia Steel, pp. 49-50.

[23] R. p. 59.

[24] 334 U. S. at 517-518.

"The Supreme Court noted that the Government suggested that by 'technological advances or business expansion,' Consolidated might broaden its market, but remarked that no proof of this had been advanced.[25] The Supreme Court concurred with Judge Rodney. U. S. Steel and Consolidated did not compete in the pipe market.

"The decision by both courts on the pipe market, where data on the technology of product use was available, was clear and firm. By contrast, the language in the discussion of the structural steel market seems hesitant. Both courts seemed unsure of the facts regarding the market for rolled shapes and plates which the Government charged would be foreclosed by acquisition. The Government estimated that Consolidated would use about 34-47 per cent of the shapes or plates in the Pacific Coast Area (seven western states). The trial court compared the total purchases by Consolidated from subsidiaries of United States Steel in the 'Consolidated market.' These ran between 1 and 2 per cent of total sales in the market from 1937 to 1946. Consolidated's total purchases from others ran between .8 and 2.9 per cent of total sales during that period. The conclusion was that this was not substantial. The Supreme Court held that the structure of the market had so changed due to postwar developments that prewar figures were not applicable. Later, however, they remarked that Consolidated had only about 3 per cent of the market (on a national basis) and expected developments should lower that figure.[26]

"The dissent defined the relevant market as shapes and plates (not total purchases) in the 'Consolidated market' and arrived at a figure of 76 per cent as Consolidated's position.[27]

"The *Columbia* case shows the court's interest in market definition based on technical and economic relationships, and not just customary classifications. The elaborate statistical work on the part of the Government seems to have failed in its purpose because the Courts were not convinced of the logic of the classifications, definitions, and economic assumptions underlying the data."

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[25] 334 U. S. at 530.

[26] 334 U. S. at 527.

[27] 334 U. S. at 538.

Alcoa: "Perhaps the most famous definition of an industrial market was the decision in the *Alcoa* case.[28] The opinion is so familiar that it need not be discussed in detail here. However, Judge Knox's decision of the remedy[29] in the *Alcoa* case makes great use of economic data in determining market limits.

"Judge Knox decided that:

> In the aluminum industry, competition manifests itself in the market for fabricated aluminum products rather than in that for pig and ingot. In determining the relative shares of the market among Alcoa, Reynolds, and Kaiser, the integration of these producers requires 'market' to be a broad concept unrelated to any particular aluminum product.[30]

"The Court held that because Reynolds and Kaiser supplied little pig and ingot to the non-integrated fabricators this did not mean that they were not potential competition for Alcoa. A statement of the share of ingot and pig provided by Alcoa would overstate its power due to the possibility of Reynolds' and Kaiser's supplying if Alcoa raised the price.

"The Court included scrap aluminum in the market, arguing that the war and the existence of Reynolds and Kaiser prohibited control by Alcoa. Secondary aluminum was also included. The Court believed the issue was the sources of supply available at the fabrication level. The Court concluded that from the standpoint of fabricators there was little difference between primary and secondary (this was evidenced by secondary having sold at a higher price than primary on several occasions) and therefore could be included.[31]

"In brief, Judge Knox defined the market by looking at the fabrication of end use products and deciding which sources of supply were technologically substitutable at no major cost disadvantages. This allowed the Court to exclude other 'light' metals, but to include secondary aluminum and scrap.

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28 *U. S.* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

29 *U. S.* v. *Aluminum Co. of America*, 91 F. Supp. 333.

30 *Ibid.* at page 357.

31 *Ibid.* at page 358.

"The next problem was measuring Alcoa's share of the market. Judge Knox first used the input method of Judge Caffey by measuring purchases of primary, estimates of scrap, etc. This measure, when applied over time, indicated that Kaiser and Reynolds had a growing strength.

"Judge Knox inclined to a measure he called the outgo method. This measured sales of each firm. The Court felt that this 'throws light on the marketing practices and customer relationships which may favor a particular customer.' [32] The Court pointed out it had the disadvantage that dollar figures could not be compared between integrated and non-integrated firms. Judge Knox used poundage figures to enable comparison at different stages of production. The results agreed with the input method.

"This decision demonstrates the use by the courts of the concept that the market involves economic substitution. The evidence Judge Knox based his conclusion on could best be described as economic and technical."

Paramount: "The *Paramount* case[33] is another example of the importance of making market definitions explicit. The Government had charged that the five major motion picture producers (Paramount, Loew's, R. K. O., Warner Bros. and 20th Century Fox) and the leading independent distributors and producers violated Sections 1 and 2 of the Sherman Act by their practices of leasing pictures and their control of first-run movie houses by integration. One of the reliefs prayed for by the Government was divestiture. The three-man trial court adjudged monopoly[34] to exist but did not feel divestiture called for. The Supreme Court reversed the decision and held that divestiture was necessary.

"The case centered around the practices used in licensing films and in acquiring and managing integrated theaters. The Government charged these policies were illegal; the producers defended them as competitive and necessary trade practices. They denied any motive of discrimination. The Government held that the structure of the

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[32] *Ibid.* at page 359.

[33] *U. S.* v. *Paramount Pictures*, 66 F. Supp. 323; 334 U. S. 131.

[34] Circuit Judge Augustus N. Hand, District Court Judges Goddard and Bright.

industry was both a result of the practices used by the producers and necessary to the operation of these practices.[35]

"An understanding of the structure of the movie industry requires a definition of the market for films. The Government's case was based on the implicit assumption that the geographical boundaries of the final market for movies were limited to each large city and that there was no national market. However, this was never made explicit, and the Government did not try to prove the correctness of this definition.

"The District Court defined the market as including all moving picture theaters in the United States, which meant that the defendants controlled only about one-sixth of the outlets, not enough, it was held, to present a problem of monopoly. The Court specifically said, 'It is only in certain localities, and not in general, that an ownership even of first-run theaters approximating monopoly exists.' [36]

"In regard to the 92 cities of over 100,000 population for which data had been submitted by the Government, the Court found that 60 per cent had independent theaters and held that with a bidding system for films the independents could compete. In brief, the Court on the basis of the evidence presented found no problem of monopoly which could not be corrected by prohibition of certain trade practices.

"On appeal, the Government did not challenge the finding of no actual monopolization, though in a footnote it said that the Court was 'clearly wrong.' [37] The Government based its plea on the argument that the appropriate relief, on the basis of the lower court's findings, was dissolution.

"The Supreme Court went beyond this and set aside the findings of no monopoly and no need for divestiture. The Court defined the market as the 'first-run field' and gave it a geographical location of the largest cities. The Court also analyzed the relationships between the practices held illegal and the structure of the industry.

"The Supreme Court supplied the analysis necessarily implied in the Government's case. Perhaps, had the issue been dealt with

[35] 334 U. S. 131 R. 2579.

[36] R. p. 3552.

[37] Supplementary appeal brief for the U. S., pp. 56-57

more directly before the lower court, the decision in that case might have been different."

Price Behavior: The analysis of pricing practices is often of crux importance in both the simple Section 1 cases and the "big" cases. In the monopolization cases the judges have examined price behavior as an indicator of monopoly or conspiracy to monopolize. The Kaysen-Hall study looked briefly into several cases including the new *Tobacco,*[38] the *Morton Salt,*[39] the *Tag Institute,*[40] and *Allied Paper Mills,*[41] and some miscellaneous cases.

The analysis of price behavior is especially difficult for the unaided lawyer. Often very elaborate statistical compilations and manipulations are required to test the charges or presumptions as to price uniformity, price leadership and price agreement. Collecting and arraying the evidence may be enormously time consuming, costly and difficult. Reaching the appropriate conclusions as to significance may be even more trying. Yet, the basic character of pricing in our exchange economy makes it essential to keep behavior in prices under surveillance and to make price agreements *per se* violations. Unfortunately, the isolation and examination of the basic price and business practices affecting it, is often a very complicated matter calling both for high technical competence in analysis and wisdom in interpretation.

Profits: The relationship of profits to monopoly receives a great deal of attention in economic literature. The Courts, on the contrary, "have so far been unwilling to accept profits as an indicator of monopoly power." For example, in the *Cellophane* case the government contended "that profits were higher than they would have been in a competitive market." The government made two arguments. First, that in a competitive market prices are set and then the yield on investment is determined, where with *Cellophane* the yield was determined and then the price set.[42] The Court

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[38] *American Tobacco* v. *U. S.*, 147 F. 2d 93, 328 U. S. 781.

[39] *Morton Salt et al.* v. *U. S.*, 235 2d 573.

[40] *Tag Manufacturers Institute* v. *Federal Trade Commission*, 174 F. 2d 482 (1st Cir. 1949).

[41] *Allied Paper Mills* v. *F. T. C.*, 168 F. 2d 600.

[42] 351 U. S. 377 R. 983.

accepted the DuPont explanation that setting a rate of return represented aiming for a goal for which investment of stockholders' capital could be justified.[43] The second argument was that profits higher than ordinary evidenced monopoly. The government first proposed comparing profit rates of the cellophane division with other DuPont divisions. The Court told counsel that such comparisons were irrelevant and that only a comparison of the rate of return of cellophane vis-à-vis other packaging materials would be of interest. Even so, Judge Leahy went on to say that he felt that profit comparisons would show nothing about market dominance.[44]

Miscellaneous Elements of Market Performance: Other aspects of market performance have received even less systematic attention from the courts than has profits. The significance of research and progressiveness has been argued in several recent cases, but the weight finally given to an evaluation of it by the Court has not been great.

In *Cellophane,* the government argued that research and patents had been used an an aggressive instrument, contributing to DuPont's illegal dominance of the market. But the Court was convinced by the counter-argument of the defense, and, finding no dominance of the market as defined by it, held that good performance in research was one of the legitimate competitive means by which DuPont achieved its success.[45]

Again, in *Hughes Tool,* the appeals court found the leasing arrangements justified in view of their relation to research, on which Hughes' market position was based;[46] although Judge Wallace, in the *Ford* case, found no necessary connection between the lease arrangements and Hughes' successful research.[47]

In *National Lead,* market performance played no part in the Court's determination of liability, but clearly did influence its denial of the government's request for dissolution. Judge Rifkind asked

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43 *Ibid.*

44 *Ibid.* R. 992-993. See Stocking and Mueller, "The Cellophane Case," *American Economic Review,* Vol. XLV, for a fuller discussion of the court's treatment of profits.

45 Decision, p. 316.

46 15 F. 2d at 932-3.

47 114 F. Supp. at 547.

to be convinced that the "competition of four is better than the competition of two, or that the competition of six is better than the competition of three or four," and in the context, he clearly meant "better" to be interpreted in performance terms.[48] The government apparently failed to satisfy him.

Similarly, in examining the advisability of dissolution in *Alcoa*, Judge Knox felt that the relevant factors included, inter alia, ". . . national security interests in the maintenance of strong productive facilities, and maximum scientific research and development; together with the public interest in lowered costs and uninterrupted production."[49] In effect, he was asking for a forecast of good performance after the remedy; and refused the requested dissolution of Alcoa on performance grouds.

Conclusions re Economic Analysis in Sample Antitrust Cases

The examination of the sample cases pointed clearly to the conclusion that "Economic evidence is important in antitrust cases. Judges not only listen to it when it is offered, they sometimes ask for it when it is not; and what is offered influences findings, decisions, decrees." But problems of market definition and market share and price received the major share of the judges' attention.

The review of the cases, pointed however to another important conclusion. "Economic 'evidence,' strictly speaking is not enough. Economic argument is also required. The 'facts' must be placed in a conceptual framework provided by economic conceptions—theory, if you will. In trying an ordinary private-law case, the Court has a whole conceptual apparatus, which it shares with the bar—reasonable men, necessary and probable consequences of action, etc.—by means of which the 'facts' in evidence are organized. In antitrust cases neither the Courts nor the bar are in this position; thus some care in placing economic facts in an appropriate frame of economic argument is of the highest importance."

An Analytical Framework for Antitrust Enforcement: Rightly or wrongly there is no general theoretical pattern or frame of analysis in selecting or handling antitrust cases or relief measures in this

[48] Record 1204.

[49] 91 F. Supp. at 347.

country. This is not to say, that there is no guidance at all. Legislation, judicial reviews, and administrative experience do provide a basis for case by case action in relation to complaints filed. We lack, however, a well formulated economic frame of analysis. The most helpful approach at the general level would be the analysis of the interrelations of market structures, market conduct and market performance. But antitrust enforcement has made relatively little use of this framework of analysis, or for that matter, of any other systematic framework.[50]

Market structure comprises the external and permanent or slowly changing aspects of a market or industry to which a business enterprise must adapt itself in trying to fulfill its objectives. The most important elements of market structure, it is well recognized, are (1) the number and relative size of sellers and buyers (degree of concentration), (2) the given technology of production and marketing, (3) the production characteristics of the products sold, together with (4) consumption uses and demands, (5) size and rate of growth of the industry, (6) the conditions of entry by new sellers, and (7) geographic distribution and organization.

Market conduct or behavior comprises the conscious policy decisions of firms in adapting to or operating within their markets. Included are, for example, the methods of determining prices, sales promotion policies and practices, relative independence of actions in relation to competitors, and the specific character and impact of certain practices upon the opportunities of competitors (i.e. whether unduly exclusionary or restrictive).

Market performance has to do with the end results which emerge from market structure and conduct in terms of efficiency, product variety, and technical progress.

Now, in the abstract competitive models of economic theory, there is a direct relationship and linkage between market structure, conduct and performance. In actual markets, however, there may be no clearly discernible pattern of relationships sufficient to allow close predictions as to performance. There are, however, broad observable associations between some structural factors and market behavior and performance. Even though in real market situations the patterns of association may depart widely from or bear little

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50 Some of what follows is taken verbatim or adapted from our report.

resemblance to those of theoretical models, the market structure-conduct-performance frame of reference is the most useful that is now available for antitrust purposes. Antitrust enforcement, however, must be focused upon conduct in the context of market structure, and not upon performance directly. The purpose of the antitrust activity is to achieve and maintain active competition, and hopefully, in this manner, improve market performance. For this reason, among others, the simple *per se* prohibitions of collusive conduct are basic. Antitrust policy does and must condemn all trusts—not merely "bad" trusts, if we wish to maintain the unique character of our historical system of enforcement. It is not the function of antitrust enforcement to evaluate performance as such directly but only to use performance as evidence of the presence or absence of market conduct and market structures which prevent or limit competition.

The market structure-conduct-performance general frame of reference and approach is most useful in selecting and handling the so-called "big" cases, and in the review of mergers. Of course, to be in "violation" there must be "illegal conduct." But in the "big" cases, conduct must be appraised in terms of market structure. Active, effective competition is aggressive. Business firms do wish to increase their sales or market shares and to win out over their competitors. What the government should be seeking is *conduct that is more restrictive than necessary* in the full market context including the underlying forces of technology and demand operating in a particular market.

A reasonable and sensible general conceptual framework would not in itself guarantee that economic evidence would be arrayed and interpreted cogently and clearly. It merely assists in putting the pieces of the case together so that competitive behavior may be seen in its proper interpretive setting. There still remains the specific analysis of and argument over each issue and problem. In the cases reviewed by Kaysen and Hall, the government, in a number of instances, was weak in specific economic analysis and argument. Defendants in these instances did a better job on this score. Thus, in the *Cellophane* case it was held that the trial court rested its whole opinion on the definition of the market, well argued, within a reasonable analytic framework "that not only a particular physical product, but also its close substitutes, must be considered in defining

the market." The government, on the other hand rested "content with citing previous cases holding that markets should be narrowly defined" and used the evidence of corporate memoranda, to support the view that cellophane was considered to be a separate market. In this and other instances, the problem was not one of lack of evidence, but rather of perception and exposition. Judging from the cases examined, the government tends at times to stand too strongly on arbitrary and traditional positions supported by legal precedent instead of well-argued interpretations of the nature of reasonable competitive conduct under the circumstances of the case.

The Near Future: Our discussion has now arrived at the point where we can take a reasonable view of the near future needs and likely developments in the use of economic analysis in antitrust activity on both the public and private sides. Very likely the issue was brought to a sharp focus and the outcome foreshadowed in the discussions and *Report of the Attorney-General's Committee to Study the Antitrust Laws.* Economists in terms of numbers represented about twelve per cent of this committee. (It happens, too, that economists have about the same representation in the Antitrust Division of the Department of Justice.) Although economists participated actively in most discussions, only a small separate section was devoted to economic analysis. This section on "Economic Indicia of Competition and Monopoly" begins with the statement "In antitrust cases courts may be called upon to measure the actual or probable effect of business conduct upon competition." [51] The exclusion of the *per se* area of violations is noted and the discussion is focused upon great areas in which conduct and practices are not unreasonable *per se.* Such conduct and practices "are subject to more extensive market inquiry under the standards of the antitrust laws. This means that their actual or probable market consequences must be determined as a part of the test of their legality. Such determination, in turn, involves resort to economic analysis." [52] But the economic analysis of "pure or perfect" competition is discarded in favor of the more complex and multiform theory of "workable" or "effective competition." Even so, it is stated "that

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[51] *Report of the Attorney General's National Committee to Study the Antitrust Laws,* March 31, 1955, p. 315.

[52] *Op. Cit.*

this section of the Report is intended as an economic not a legal analysis of competition and monopoly." [53]

I think it is evident that economic and legal analysis as of this moment have not been merged organically in antitrust activity. But our review of court cases showed clearly that economic analysis is used and often demanded when absent in recent court cases: It would appear that we have about reached a point at which economics is being brought into at least junior partnership. This partnership whether on the government or private side will be much more effective if the duties and responsibilities of the partners are made as explicit as possible.

It is my considered view that on the government side, economic analysis deserves top level participation in the determination of policy, in the selection and strategy of cases, and in the decisions as to remedial measures, and in follow up. On the private side, economic analysis (and hence economists) should have equivalent advisory, consultative, research and analytical roles. Economists need not merely be in the expert witness stable to be called out as needed, but should be involved in the over-all thinking and planning. As all of you know, this state of affairs already is here in some instances.

After all, antitrust is intended to maintain and enhance competition. The analysis of competition has been the core of economic theory for many decades. In recent times, economic analysis has developed increasing capacity to relate its theoretical postulates to market realities. A sizeable, rapidly growing literature demonstrates and reflects this more realistic interest and stress.

Economic analysis, admittedly, is at its best in the aggregative analysis of the functioning of the economy as a whole. Economists are ideally qualified to place antitrust in the perspective of the total play of relations and conditions affecting our prosperity and stability. On the government side such analysis should influence the selection and prosecution of cases. On both sides, and in the total perspective, we must keep reminding ourselves that the essential objective and purpose of antitrust is to maintain free markets as our unique means of coordination and control in our free enterprise society. Hence, antitrust activity may be expected to gain from any enlargement of

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53 *Ibid.* p. 316.

general perspective or of new specialized insights into the functioning of markets and of business policies and behavior.

As I see it, we are now moving along a broad front in both business and government in relation to developments in education which should ultimately give us a much better, integrated and realistic approach.

And now may I turn back again to Thurlow Gordon's praise of the Graduate Schools of Business Administration for their "lively and realistic understanding." Unfortunately, academic economic analysis in economics departments and the study of business policies, strategy and behavior in schools of business have often been poles apart. At the one extreme were the formal, pure abstractions of economic theory remote from contact with particular situations or problems. At the other, were spot, individual, unsystematic case studies. In between were no bridges and the distances were too wide even for great leaps.

There is now reason to believe that the gap is being bridged between formal theory and business realities. And fortunately the foundation piers are being pushed out from both banks. Economists have been developing more realistic theories of and adaptations of the theories of competition. And scholars concerned with business policies, strategies and decision making are developing general analytical frames of reference and well-reasoned interpretations and theories of and for business decision making. One cannot be certain as yet, but it is very likely that we shall have in the foreseeable future a much more adequate basis for describing, appraising and guiding business behavior in relation to the tests and requirements of active competition.

Just what will emerge will depend to some extent upon whether we really mean it in the antitrust approach. To repeat, in its essence, antitrust enforcement is intended to maintain and enlarge the area of private decision making in free markets. Economic and marketing facts and evidence must of necessity be basically important in this endeavor especially in the concentrated industries. We must be careful, however, that the insights of the emerging, more illuminating and realistic interpretations are not obscured in the fogs of special pleading and the rationalization of established business behavior. We would make more rapid progress both in academic analysis and

in antitrust enforcement if economic analysis were represented at the top level conference table instead of being brought in through expert witnesses to defend or refute the *status quo* or established legal dogma and precedents. In other words, economists must become full partners in the antitrust enterprise. But to win and hold such partnerships, economists must be qualified to relate the basic characteristics of reasonable, independent business behavior to the requirements of active competition in the economy as a whole.

ANTITRUST NEWSLETTER

Supreme Court (as of October 15, 1958)

Dkt. 17—*Eagle Lion Studios, Inc., et al.* v. *Loew's Inc., R. K. O. Theatres, Inc., et al.* (S. D. N. Y.), December 5, 1957, Petition Filed. January 20, 1958, Petition Granted. Affirmed November, 1958.

The Second Circuit affirmed the District Court's ruling that two motion picture theatre circuits and a booking company did not conspire in violation of the Sherman Act to exclude other companies from the opportunity of licensing feature motion pictures on a competitive basis. It was the contention of the petitioner that the lower court had misconstrued Section 5 of the Clayton Act by failing to make available to petitioners all matters previously established by the government in antitrust actions.

Dkt. 18—*International Boxing Club of New York, Inc.* v. *United States* (S. D. N. Y.), Appeal filed December 9, 1957, March 17, 1958, probable jurisdiction was noted. Affirmed January 12, 1959.

The U. S. District Court for the Southern District of New York had held that two individuals, two boxing clubs and a stadium corporation had conspired to restrain and to monopolize the promotion of professional championship boxing contests and had monopolized the promotion of such boxing contests. Very broad injunctive relief was granted by the Court.

The question presented to the Supreme Court relates only to the nature of the relief granted. The case is particularly important in that it gives a guide to the type of relief which the Supreme Court will deem applicable to a monopoly case of this nature.

The Supreme Court in sustaining the relief granted by the Trial Court, reaffirmed its statements in the *Schine* case, 334 U. S. 110,

to the effect that the decree in a monopolization case should (1) put "an end to the combination or conspiracy. . . ." (2) deprive "the antitrust defendants of the benefit of their conspiracy" and (3) "break up or render impotent the monopoly power which violates the Act."

The relief granted by the Trial Court and affirmed by the Supreme Court included divestiture of stock by major stockholder defendants, dissolution of the International Boxing Club, an injunction against the annual promotion of more than two championship fights in the Chicago Stadium and Madison Square Garden, an injunction against exclusive agreements and required leasing of the premises (when available) to any duly qualified promoters on reasonable terms.

Dkt. 24—*Guerlain, Inc.* v. *United States* (S. D. N. Y.), December 30, 1957, Appeal filed. February 3, 1958, probable jurisdiction was noted. March 3, 1958, case transferred to Summary Calendar. Judgment vacated December 15, 1958.

U. S. District Court for the Southern District of New York held that an American company, having a French affiliate which granted to the American company the exclusive right to distribute trademark goods in the United States, had attempted to monopolize and did monopolize the importation into and the sale within the United States of such trademark goods by utilizing Sec. 526 of the Tariff Act of 1930. There are two basic questions to be considered by the Supreme Court in this appeal. The first question related to the definition of the relevant market upon which to measure the alleged monopolization. The second question related to the interrelationship between Sec. 526 of the Tariff Act of 1930 and Secs. 1 and 2 of the Sherman Act.

The Judgment was vacated on motion of the Department of Justice under unusual circumstances and was referred back to the District Court for consideration of vacation. It would appear that the government had determined that the original action should never have been instituted and that the judgment of the District Court would be reversed if reviewed at the Supreme Court level.

Companion cases to Dkt. 24 are Dkt. 30, *Parfume Corday, Inc.* v. *United States*, and Dkt. 31, *Lanvin Parfums, Inc.* v. *United States*.

Dkt. 45—*Beacon Theatres, Inc.* v. *Hon. Harry A. Westover* (9th Cir.), April 8, 1958, Petition filed. May 19, 1958, Certiorari granted. Argued December 10, 1958.

The Ninth Circuit denied defendant's petition for writ of mandamus to compel the trial court to vacate orders granting the plaintiff's motion to strike defendant's demand for a jury trial on a complaint and answer and directing the issues to be tried to the Court without a jury separate from defendant's counterclaim for damages under the antitrust laws.

Dkt. 49—*Local 24 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO* v. *Oliver* (Ohio Supreme Court), Certiorari granted May 26, 1958. Reversed January 19, 1959.

The Ohio Supreme Court dismissed an appeal from the Ohio Court of Appeals which held that a provision of a contract between the Union and a group of motor carriers was illegal under the Ohio antitrust laws. The contract fixed the prices to be paid for the use of trucks and trailers leased by the owners to motor carriers. The opinion also provided that the Ohio State courts had jurisdiction to enjoin the enforcement of the contract and to declare it null and void.

The Supreme Court in reversing the judgment pointed out that a state's antitrust laws cannot be applied to prevent a teamster's union and a group of motor carrier's union from a collective bargaining agreement which the Taft-Hartley Act directs them to bargain. The authority of the federal law in this area is paramount and the application of the state law is outside the power of the state to act.

Dkt. 54—*United States* v. *Radio Corp. of America, et al.* (U. S. D. C., E. P.), April 22, 1958, Appeal filed. June 16, 1958, jurisdiction noted. Argued, December 8, 1958.

The District Court held that it did not have jurisdiction of the government complaint charging an illegal exchange of television and radio stations with another broadcasting company because the F. C. C. had approved the exchange and granted the licenses. The question presented to the Supreme Court is whether under the facts of the case the approval by the F. C. C. excluded jurisdiction of the District Court. The government contends that the F. C. C. had

erred in that the approval by the F. C. C. did not include the larger conspiracy described in the complaint, nor did it include all the parties. Another instant question presented is whether the government in failing to appeal from the F. C. C. order was guilty of laches or estoppel which precludes the seeking of relief in an independent action filed with the District Court.

Dkt. 76—*Klor's Inc.* v. *Broadway-Hale Stores, Inc., et al.* (9th Cir.), May 31, 1958, Petition filed. Certiorari granted October 13, 1958.

The Circuit Court affirmed a dismissal of a retail store's action charging a conspiracy among certain suppliers to refuse to sell the plaintiff certain merchandise. The Court ruled that the complaint and the proof did not allege and show "injury to the public" and that therefore plaintiff's action must fail.

According to the petitioners the questions presented are whether Section 4 of the Clayton Act affords protection to single traders from conduct condemned by the Sherman Act and whether federal courts can dismiss complaints under a summary judgment procedure on the ground that the antitrust laws protect only the public at large and not the single trader.

Dkt. 234—*Federal Trade Commission* v. *Mandel Brothers, Inc.* (7th Cir.), Petition filed July 30, 1958. Certiorari granted October 13, 1958.

The case involved the Fur Products Labeling Act. The District Court had modified and affirmed the F. T. C. order prohibiting a department store from misbranding and falsely advertising furs.

Dkt. 252—*Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Assn., Inc.* (Appeal from the Supreme Court of the State of Oklahoma), Appeal filed August 4, 1958. Jurisdiction noted October 13, 1958.

The Oklahoma Supreme Court held that a retail grocery chain violated the Oklahoma Unfair Sales Act when it sold groceries at prices below the minimum statutory cost so as to meet the alleged reduced prices of competitors who were giving trading stamps with the purchase of groceries. Safeway contends that the Oklahoma Act violates the United States Constitution.

Dkt. 267—*Jack H. Kelly* v. *Vincent W. Kosuga* (7th Cir.), Petition filed August 11, 1958. Certiorari granted October 13, 1958. Argued January 22, 1959.

The Seventh Circuit held that an action under the Sherman Act to recover a balance due on a contract for the sale of onions was not barred even though the agreement contained reciprocal promises to refrain from dealing in onions on the futures market.

The question presented is whether the District Court's holding that the petitioner's affirmative defense that the agreement constituted a violation of the Sherman Act was sufficient.

Dkt. 404—*Melrose Distillers, Inc.* v. *United States* (4th Cir.), Certiorari granted November 10, 1958.

The petition was granted for the limited question as follows:

> "Can a Maryland corporation or a Delaware corporation be further criminally prosecuted (in a federal court for a federal offense) following its dissolution under the laws of the state of its creation occurring after indictment but before arraignment or plea, such dissolution timely appearing of record in the case?"

The States of Maryland and Delaware were invited to file briefs, as *amici curiae*.

Dkt. 406—*Federal Trade Commission* v. *Simplicity Pattern Co., Inc.* (C. A. D. C.), Petition filed September 26, 1958.

The F. T. C. appealed from the Circuit Court's ruling that the F. T. C. order should be set aside in that the manufacturer was not given the opportunity to present evidence of cost justification to dispel the charge of unlawful discrimination in violation of Section 2(e) of the Clayton Act.

Dkt. 489—*Pittsburgh Plate Glass Co.* v. *United States* (4th Cir.), Petition for certiorari granted December 15, 1958 but limited to the single question:

> ". . . '1. In the trial of a federal criminal action, when the principal witness for the prosecution stated that he had testified three times before the indicting grand jury upon matters covered by his testimony at the trial, was it reversible error for the trial judge upon motion duly made to deny to the defendants for

use in cross examination, inspection of the transcripts of the grand jury testimony of that witness?' "

Dkt. 527—*Schine* v. *United States* (2nd Cir.), Certiorari denied January 12, 1959.

The Supreme Court refused to review the affirmed judgments declaring defendants guilty of criminal contempt by violating provisions of a government antitrust consent decree, and imposing fines totaling $73,000 on the defendants.

Dkt. 552—*Minneapolis & St. Louis Railway Co.* v. *United States* (D. C. Minn.), Appeal filed December 1, 1958.

The acquisition of a railroad by two other railroads was held not to violate Section 7 of the Clayton or Section 1 of the Sherman Act where the I. C. C. had concluded that any adverse effects on competition were far outweighed by other facts in the public interest.

Dkt. 567—*United States* v. *Parke, Davis & Co.* (D. C. D. C.), Appeal filed December 10, 1958.

The District Court had dismissed a civil action charging a conspiracy to maintain resale prices and to boycott retailers who refused to enter into the alleged conspiracy. The appeal should include an elaboration by the Supreme Court of the doctrine enunciated by the *Colgate* case.

Other Court Decisions

Niagara of Buffalo, Inc. v. *Niagara Mfg. and Distributing Corporation* (C. A. 2d, decided December 31, 1958).

In reversing the dismissal of a treble damage action, the Court of Appeals for the Second Circuit holds that the trial court's ruling that a pleading in an antitrust suit requires a statement of matters considerably more extensive than a pleading in a negligence or contract action is incorrect.

Basle Theatres, Inc. v. *Warner Bros., et al.* (U. S. D. C. W. D. Pa., dated October 27, 1958).

Motion picture distributors unreasonably restrained and attempted to monopolize the distribution and exhibition of motion pictures in the Pittsburgh, Pennsylvania area by conspiring with each other

to maintain a uniform system of runs, clearances, and availabilities. The unreasonableness of the clearance system was demonstrated by the fact that it was maintained for almost a quarter of a century without being modified as business changes occurred. An operator of a drive-in theatre which received films later than other theatres similarly situated was unreasonably discriminated against and is entitled to an injunction.

Kinsey Distilling Sales Company v. *Foremost Liquor Stores, Inc., et al.* (Ill. Sup. Ct., dated November 26, 1958).

The Illinois Supreme Court holds, in a liquor distributor's fair trade action against retailers, that the Illinois Fair Trade Act does not deprive "non-signers" of property without due process of law in violation of the Illinois Constitution and does not delegate legislative price-fixing power to private persons. Retailers who have not signed fair trade contracts impliedly assent to them if they buy the fair trader's goods with knowledge of the fair trade contracts. If they buy without such knowledge, they can assert that fact as a defense. Also, the Act does not violate the Federal Constitution because of its conflict with the Sherman Antitrust Act prior to the enactment of the Miller-Tydings and McGuire Acts.

Johnson and Johnson v. *Narragansett Wiping Supply Co., et al.* (Superior Ct., R. I., dated November 21, 1958).

The constitutionality of the Rhode Island Fair Trade Act is upheld by a Rhode Island trial court. Also, fair trade contracts entered into in New Jersey are enforceable under the Rhode Island statute, and a New Jersey corporation could enforce such contracts in the Rhode Island Court.

In the Matter of Syracuse Cooperative Milk Distributors' Bargaining Agency, Inc. v. *Attorney General of the State of New York* (N. Y. Sup. Ct., Sp. Term, Onondaga County, dated August 1, 1958).

The possible exemption of a milk distributors' cooperative from prosecution under the New York antitrust laws does not invalidate a subpoena issued by the Attorney General of New York directing the cooperative to produce certain books and records in an antitrust investigation. Subpoenas may be issued to strangers to a controversy.

Also, the documents sought were relevant and material to an authorized investigation.

Simplified Tax Records, Inc. v. *Your Income Tax Records, Inc.* (N. Y. Sup. Ct., N. Y. County, Sp. Term Part III, dated November 19, 1958).

Defendants charged with attempting to induce distributors to breach their contracts with the plaintiff failed to show that the distribution contracts were illegal under the Clayton Act. There was no real showing that the contracts tended to create a monopoly or substantially lessen competition.

Sandridge v. *Rogers, et al.* (U. S. D. C. S. D. Ind., dated October 15, 1958).

Quarry operators who closed down a land-owner's limestone quarry after acquiring a corporation that leased the quarry did not restrain or monopolize trade in violation of the antitrust laws. They controlled only a small per cent of the limestone produced in the area, and their conduct did not change the price, quality, or availability of the product in interstate commerce to the detriment of the public. Also, the action, which was commenced after the effective date of the Federal statute of limitations, was barred by an Indiana two-year statute of limitations.

Beacon Fruit and Produce Co., Inc., et al. v. *H. Harris & Co., Inc., et al.* (C. A. 1st Cir., dated November 19, 1958).

A trial court's ruling that operators of an auction market for the sale of fruit did not violate the Sherman Act by imposing on fruit dealers a five-cent per package service charge is affirmed on the ground that the findings of the trial court were amply supported by the evidence.

Dollac Corporation v. *Margon Corporation* (U. S. D. C. D. N. J., Supp-Opinion filed July 15, 1958).

The acquisition and accumulation of patents by a manufacturer of movable eyes for dolls and other toys was not unlawful under the antitrust laws. Evidence revealed that most of the manufacturer's patents covered inventions developed by employees under a research program. Also, the institution of patent infringement suits was not unlawful. There was no evidence that the suits were sham and

brought for the purpose of stifling competition. Furthermore, there was no evidence that the manufacturer's price reductions were not effected in good faith and for the purpose of meeting competition.

The International Nickel Co., Inc. v. *Ford Motor Company and Caswell Motor Co., Inc.* (U. S. D. C. S. D. N. Y., filed September 26, 1958).

A patent on nodular iron is not rendered unenforceable against an infringing automobile manufacturer and an infringing automobile dealer by the patentee's practice of requiring licensees to "license-back" to the patentee any inventions which improve the patent.

Strans Auto Sales Corp. v. *World Wide Automobile Corp., et al.* (U. S. D. C. S. D. N. Y., filed September 30, 1958).

An automobile dealer which charged a distributor of foreign cars and two dealers with monopolizing the foreign car market in violation of the antitrust laws is entitled to a trial where it specified facts which raised an issue as to whether the relevant market was the automobile market or the economical foreign car market. Also, an issue is raised as to whether or not the share of the market held by the distributor and dealers constitutes a monopoly.

Aladdin, Inc. v. *Krasnoff, et al.* (Sup. Ct., Ga., decided October 10, 1958).

An employee's covenant not to compete with his employer in the janitor supply business in Atlanta, Georgia, for two years is a mere partial restraint of trade, reasonably limited as to time and area. However, a covenant not to disclose the names and addresses of customers, without any limitation as to time and area, is an attempt at a general restraint of trade contrary to Georgia law and is, therefore, unenforceable.

Union Carbide Corp. v. *Commuters Hardware Co., Inc.* (N. Y. Sup. Ct., N. Y. County, Sp. Term, dated October 21, 1958).

A fair trader's enforcement action may be settled by the defendant's return of the merchandise and discontinuance of its sale, if the fair trader consents to accept a return satisfactory to the defendant, and if the defendant will consent to a final order.

Bertha Bldg. Corp. v. *National Theatres Corp.* (U. S. D. C. E. D. N. Y., dated October 15, 1958).

A Federal District Court in New York holds that it is required, by the principle of the "law of the case," to apply a six-year rather than a three-year New York statute of limitations to an action that accrued in California. In prior proceedings in the same case, another judge of the same court had found the six-year statute applicable, and an appellate court, by necessary implication, had made a similar ruling.

McManus v. *Capital Airlines, Inc., et al.* (U. S. D. C. E. D. N. Y., dated September 30, 1958).

Five corporate airlines were not subject to the jurisdiction of the United States District Court for the Eastern District of New York by virtue of the fact that tickets for transportation on the airlines, which did not operate airplanes in the District, were sold in the District. Even though a passenger could purchase a ticket in the District, he could not use it in the District; therefore, the airlines were not doing business in the District.

Sperry Rand Corporation v. *Nassau Research and Development Associates, Inc., et al.* (U. S. D. C. E. D. N. Y., dated October 7, 1958).

A company which was allegedly forced to withdraw its financial participation in another company, a counter-claimant, by a plaintiff's alleged threats is a victim of the plaintiff's action rather than a co-conspirator and is therefore not a necessary defendant on the counterclaim. Also, individuals employed by the plaintiff are not necessary defendants on the counterclaim since a corporation conspiring with its own employees would be conspiring with itself.

Radiant Burners, Inc. v. *American Gas Association, et al.* (U. S. D. C. N. D. Ill., E. Div., filed October 8, 1958).

A private action seeking treble damages is dismissed for failure to show injury to the public sufficient to warrant imposition of the sanctions of the antitrust laws.

Department of Justice Activity

U. S. v. *Plastering Development Center, Inc., et al.* (U. S. D. C. N. D. Ill., Consent judgment, January 21, 1959).

Attorney General William P. Rogers announced the entry in the Federal District Court in Chicago, Illinois, of three Consent Judgments terminating a civil Antitrust case filed June 29, 1956, against Plastering Development Center, Inc., formerly E-Z-On Corp., Chicago, Illinois, Operative Plasterers and Cement Masons International Association of the United States and Canada, Cleveland, Ohio, and Bricklayers and Masons Plasterers International Union of America, Washington, D. C.

The government's suit dealt with a mechanical device known as a plastering machine, sometimes referred to in the trade as a "gun," which is actuated by gas or electricity and sprays walls and ceilings of new and remodeled structures with a plaster mix containing light-weight aggregates such as perlite or vermiculite. In its complaint, the government charged the defendants with combining and conspiring to prevent outright sales of plastering machines within the United States and Canada by (1) requiring that such machines be leased only to union contractors or to non-union contractors who maintained the same working standards as the unions for the employment of plasterers and (2) prohibiting each such lessee from further assigning or subleasing such machines in the United States or Canada.

Under the Judgments, the Union defendants are prohibited from entering into any future agreements with manufacturers of plastering machines having the effect of preventing or restraining the lease, sale, or other disposition of any plastering machines, or otherwise regulating the terms or conditions under which plastering machines may be disposed of by any person. The defendant Plastering Development Center, Inc., is enjoined from imposing any terms or conditions upon any purchaser or lessee restricting the disposition of any plastering machines; from requiring that any such purchaser or lessee employ any person or class of persons designated by defendant to operate a plastering machine; from requiring a purchaser or lessee to operate a plastering machine within the working rules and regulations of a labor union; or preventing a purchaser, after payment of the full

sale price of a plastering machine, from selling, transferring or otherwise disposing of the plastering machine to others.

The unions are prohibited from knowingly permitting any affiliated local from entering into any agreement with a contractor which has the effect of precluding the contractor from acquiring a plastering machine manufactured by a company which makes such machines available to contractors not employing union members.

U. S. v. *Detroit Chevrolet Dealers' Assn., et al.* (U. S. D. C. E. D. Mich., Indictment, January 23, 1959).

Attorney General William P. Rogers announced that a Federal Grand Jury in Detroit, Michigan returned an indictment charging the Detroit Chevrolet Dealers' Association and twenty-two Chevrolet Dealers in the Metropolitan Detroit area with violation of Section 1 of the Sherman Antitrust Act in connection with the sale and distribution of new automobiles.

The indictment charges that for several years past the defendant dealers have engaged in a combination and conspiracy to raise, fix and stabilize the retail prices of automobiles sold in the Metropolitan Detroit area by agreeing to adopt and utilize uniform list prices substantially higher than the list prices suggested by manufacturers and by agreeing to refrain from price advertising.

The indictment also charges that the defendant dealers engaged in a combination and conspiracy to fix and establish a minimum gross profit to be made on new automobiles sold in the Metropolitan Detroit area by agreeing to refrain from making retail sales of new automobiles at prices which would result in the dealer realizing a gross profit of less than two hundred twenty-five dollars.

The effects of these agreements as charged in the indictment are: (a) price competition among Chevrolet Dealers in the Metropolitan Detroit area has been artificially suppressed and restricted, (b) retail list prices used by defendant dealers in selling Chevrolet automobiles in the Metropolitan Detroit area have been arbitrarily fixed and maintained at uniform and non-competitive levels and (c) purchasers of Chevrolet automobiles from Chevrolet Dealers in the Metropolitan Detroit area have been deprived of an opportunity to purchase in a free and unrestricted market.

U. S. v. ***Pitney-Bowes, Inc.*** (U. S. D. C. S. D. Conn., Consent judgment, January 9, 1959).

Attorney General William P. Rogers announced the filing in Federal District Court in New Haven, Connecticut, of a civil antitrust case against Pitney-Bowes, Inc., Stamford, Connecticut. At the same time, as a result of pre-filing negotiations, a consent judgment was entered bringing the action to a successful conclusion.

The government's case and the judgment relate to the manufacture and lease of postage meter machines, which are devices that, in one operation, print, register and cancel prepaid postage on mail matter by means of impressions. They are used by both small and large volume mailers. The Post Office Department must approve the qualification of any person desiring to manufacture and lease the metering devices used in such machines, and the regulations of that Department require that the devices be leased only and that the manufacturer be responsible for their continued operation.

According to the government's complaint, the use of metered mail has steadily increased to the point where more postal revenue is received from metered mail than the combined sales of adhesive stamps and government stamped envelopes. In the fiscal year 1957 such metered mail accounted for more than $1,000,000,000 in postal revenues. Pitney-Bowes is the world's largest manufacturer of postage meter machines, and almost 100% of all such machines now in use in the United States are manufactured and owned by Pitney-Bowes. Pitney-Bowes received an income of more than $36,000,000 from its postage meter machine business in the year 1957.

The government's action charged Pitney-Bowes with violations of Section 2 of the Sherman Antitrust Act in achieving and maintaining a monopoly of the postage meter machine industry. The complaint alleges various specific means by which Pitney-Bowes achieved its allegedly illegal position.

The judgment entered contains terms designed to restore and promote competition in this field. In addition, the judgment requires Pitney-Bowes to license and make available to qualified applicants its present and future United States and foreign patents and certain technical information and assistance. A qualified applicant is one who has been certified by the Post Office Department as meeting those standards established by that Department to manufacture post-

age meter machines. Thus, under the judgment, qualified applicants may obtain royalty-free licenses on existing patents, and reasonable royalty bearing licenses under patents which Pitney-Bowes obtains or applies for within the next five years. Patent licensees are entitled to copies of technical manuals, drawings, specifications, blueprints and other similar documents generally used by Pitney-Bowes in its own manufacture, servicing and repair of postage meter machines now commercially produced. These documents are to be furnished for a reasonable charge approximating cost. Technical representatives must upon request be sent by Pitney-Bowes to plants of any qualified applicant to consult with the applicant as to his manufacture, service and repair of postage meter machines. Certain visits to the manufacturing plant of Pitney-Bowes must also be permitted qualified applicants.

If, after ten years, Pitney-Bowes is unable to show to the satisfaction of the Court that persons in each major market area then have a practical opportunity to rent postage meter machines from someone other than the defendant, the judgment requires that Pitney-Bowes submit a plan to bring about that competitive objective as soon as reasonably possible.

As a safeguard that the giving of technical assistance to a particular applicant will not defeat the objectives of the judgment to assure effective competition, the Court specifically reserved jurisdiction to enter orders, if agreed to by the government, modifying the terms of the judgment requiring Pitney-Bowes to furnish that technical assistance.

U. S. v. *General Electric Co., et al.* (U. S. D. C. S. D. N. Y., Complaint, November 24, 1958).

Attorney General William P. Rogers announced that a civil antitrust suit was filed in New York City against General Electric Company, Westinghouse Electric Corporation, and N. V. Philips' Gloeilampenfabrieken, a leading Netherlands electronics firm, on charges of violating Section 1 of the Sherman Antitrust Act.

The complaint alleges that the defendants, operating through Canadian subsidiaries, engaged, with 13 named co-conspirators, in an unlawful combination and conspiracy in restraint of foreign trade and commerce between the United States and Canada in radio and television receiving sets. Such restraint, the complaint

alleges, was accomplished by the organization of a Canadian patent pool, controlled by the defendants' Canadian subsidiaries, which prevented the importation into Canada of radio and television receiving sets manufactured in the United States. The complaint alleges that the Canadian patent pool threatened to institute, and instituted, patent infringement suits against manufacturers or dealers selling radio or television sets manufactured in the United States, and refused to license dealers indicating an intention of importing into Canada such United States-made apparatus.

The suit also alleges that as a result of the defendants' conduct, the Canadian market for radio and television receivers has been virtually closed to United States manufacturers from early 1927 to date, and that, unlike the large volume of exports in other lines, the volume of United States exports of radio and television sets to Canada has been negligible. In 1956, United States exports of radio and television receivers to Canada amounted to only $2,356,000, approximately one percent of Canada's total sales of such apparatus in that year.

The complaint also charges that United States manufacturers, who would normally have exported such apparatus for the expanding Canadian market, were compelled instead to manufacture such apparatus in Canada. In addition, United States consumers have been adversely affected, according to the suit, in that they have been deprived of the benefits which would have resulted from increased production of such apparatus in the United States.

U. S. v. *Arthur Murray, Inc., et al.* (U. S. D. C. W. D. Mo., Consent judgment, November 21, 1958).

Attorney General William P. Rogers announced the filing in the Federal District Court in Kansas City, Missouri, of a civil antitrust case charging Arthur Murray, Inc., and three financial companies with conspiring to restrain trade in the financing of installment contracts for the purchase of dancing lessons from Arthur Murray dance studios. At the same time, a consent judgment was entered successfully terminating the case.

Named as defendants in the case and consenting to the entry of the judgment were: Arthur Murray, Inc., New York, N. Y., Educational Credit Bureau (N. Y.) Corp., New York, N. Y.;

Educational Credit Bureau, Inc. (Kansas City), Kansas City, Mo.; and Tuition Plan, Inc., Kansas City, Mo.

Specifically, the government's complaint charged the defendants with violation of Section 1 of the Sherman Act by conspiring to prevent financial institutions other than the defendant financial institutions from purchasing or collecting student installment contracts from Arthur Murray licensees. In aid of the conspiracy, the complaint alleged that the defendants formed Tuition Plan, Inc., to suppress competition from other financial houses, and that Arthur Murray, Inc., forced its licensees to place their financing with one of the defendant financial houses through threats of canceling the license of any licensee who did not do so.

Consenting to the entry of the judgment and agreeing to be bound by its terms as consenting individuals are Arthur Murray, Kathryn Murray and certain of their relatives who also have an interest in the defendant financial institutions.

The judgment entered contains various provisions designed to eliminate any interest in or control by Arthur Murray, Inc., over the defendant financial houses. Arthur Murray, Inc., is enjoined from having any officer, director or employee who is also an officer, director or employee of any financial institution or who owns any financial interest in any of the defendant financial institutions. The consenting individuals are required to dispose of all their financial interest in the defendant financial institutions within one year from the date of entry of the judgment, and the consenting individuals and Arthur Murray, Inc. are enjoined from continuing any outstanding loan to any of the defendant financial institutions beyond certain stated periods.

Each of the defendant financial institutions is enjoined from accepting financing from any Arthur Murray licensee if any person owning any interest in such defendant financial institution also holds or exercises any right to vote Arthur Murray, Inc. stock.

The judgment requires the defendant financial institutions to terminate their present agreements with the licensees. These agreements may be renegotiated but such renegotiation must be upon terms which are not inconsistent with the judgment and which provide that the agreement shall not be for more than one year

and shall be cancellable by either party at the end of any thirty day period upon written notice to the other party.

U. S. v. *Bostitch, Inc.* (U. S. D. C. D. R. I., Consent judgment, December 2, 1958).

Attorney General William P. Rogers announced the entry in the Federal District Court in Providence, Rhode Island, of an antitrust consent judgment terminating restraints of trade in the distribution and sale of stitchers and staplers. These products are used extensively in the graphic arts industry, building industry, automobile industry and others. Consenting to the entry of the judgment was Bostitch, Inc., of East Greenwich, Rhode Island.

The government's complaint which was filed on June 19, 1958, charged that Bostitch conspired with certain of its distributors to violate Section 1 of the Sherman Act. Specifically, the complaint charged that Bostitch conspired with its distributors to fix the selling prices of and to adopt uniform freight rates for stitchers and staplers. The complaint further charged them with allocating customers and dividing sales territories among themselves, and the complaint charged Bostitch with prohibiting its distributors from handling competitive stitchers and staplers.

The judgment which was entered enjoins Bostitch from agreeing with any distributor to fix prices; to fix freight rates; to limit or restrict the territories in which or the customers to whom any distributor or Bostitch may sell; to refrain from competing for any customer, territory or market and to restrict the right of any distributor to handle a competing product. The judgment enjoins Bostitch from canceling any distributorship agreement because of the distributor's refusal to agree to a contract which is inconsistent with any of the foregoing provisions of the judgment.

The judgment prevents Bostitch, for a period of two years, from entering into any resale price maintenance contracts with its dealers, and from communicating certain price information to its distributors prior to the time such information is announced to the trade generally. Bostitch is required to modify its distribution agreements to conform to the judgment and to mail copies of the judgment to named distributors. The judgment becomes effective 30 days from date of entry.

U. S. v. *Standard Oil Company of New Jersey, et al.* (U. S. D. C. W. D. Ky., Complaint, December 2, 1958).

Attorney General William P. Rogers announced the filing in the United States District Court at Louisville, Ky., of a civil antitrust suit against three major oil companies charging them with trade restraints in the distribution of refined petroleum products, in violation of the Sherman and Clayton Acts.

Named as defendants are: Standard Oil Company (New Jersey) with head offices at New York City; Esso Standard Oil Company (Esso) with head offices at New York City; and Standard Oil Company (Kentucky) with head offices at Louisville, Ky.

According to the complaint Standard of New Jersey, a holding company, controls the operations of its wholly-owned subsidiary Esso, which purchases and refines crude oil and markets petroleum products in eighteen states ranging from Maine to Louisiana. Standard of Kentucky is alleged to be engaged in marketing refined petroleum products and to be the principal marketer of automotive gasoline in Kentucky, Mississippi, Alabama, Georgia and Florida.

It is alleged that, pursuant to an unlawful conspiracy, Standard of New Jersey, Esso and other affiliates of Standard of New Jersey for many years have refrained from marketing within Kentucky, Mississippi, Georgia, Alabama and Florida, while Standard of Kentucky refrained from marketing outside of those five states and purchased most of its requirements of refined petroleum products from Standard of New Jersey, from Esso, and from other subsidiaries of Standard of New Jersey.

It is further alleged that Esso and Standard of Kentucky entered into a contract, in 1956, which requires Standard of Kentucky to purchase from Esso 80% of its requirements of automotive gasoline, kerosene, diesel fuel oil and No. 2 heating oil. In 1956 Standard of Kentucky sold over 900 million gallons of automotive gasoline and very large quantities of other petroleum products.

The complaint asks the court, among other things, to enjoin Standard of New Jersey and Esso from selling refined petroleum products to Standard of Kentucky and to enjoin that company from purchasing such products from Standard of New Jersey, Esso or any other subsidiary of Standard of New Jersey, for such time as the

court may deem necessary to dissipate the effects of the offenses alleged.

U. S. v. *Philadelphia Radio & Television Broadcasters Assn., et al.* (U. S. D. C. E. D. Pa., Consent judgment, December 5, 1958).

Attorney General William P. Rogers announced the entry in the United States District Court in Philadelphia, Pennsylvania, of an antitrust judgment terminating litigation against the Philadelphia Radio & Television Broadcasters Association and the radio broadcasting stations in that city. The judgment was entered with the consent of all the defendants.

In addition to the Association the following defendant radio broadcasters, all located in Philadelphia, Pa., consented to the judgment: Independence Broadcasting Company (WHAT); Max M. Leon, Inc. (WDAS); Pennsylvania Broadcasting Company (WIP); Seaboard Radio Broadcasting Corporation (WIBG); Triangle Publications, Inc. (WFIL); WCAU Incorporated (WCAU); WJMJ Broadcasting Corporation (WJMJ); Wm. Penn Broadcasting Company (WPEN); and L. M. C. Smith, dba Franklin Broadcasting Co. (WFLN).

The government's complaint, filed August 3, 1956, charged that the defendants had agreed to maintain, adhere to, and not deviate from the advertising rates for sale of radio broadcasting time established and published by each of the radio stations. The Final Judgment entered contains appropriate injunctive relief terminating the illegal activities alleged in the complaint. The Association is in the process of dissolution and the judgment requires that such dissolution be carried to a conclusion.

U. S. v. *McDonough Co., et al.* (U. S. D. C. C. D. Ohio, Indictment, January 7, 1959).

Attorney General William P. Rogers announced that a Federal grand jury at Columbus, Ohio indicted five corporations manufacturing hand tools and four of their officers for alleged violations of the Sherman Antitrust Act. The four corporations named as defendants are: McDonough Co., Parkersburg, West Virginia; True Temper Corporation, Cleveland, Ohio; Borg-Warner Corporation, Chicago, Illinois; Union Fork and Hoe Company, Columbus, Ohio; and The Wood and Shovel Company, Piqua, Ohio.

According to the indictment, each of the defendant corporations produces hand tools such as shovels, rakes, hoes, and other agricultural implements. The total annual sales of such hand tools by the defendant corporations allegedly exceed $30,000,000.

The indictment charges the defendants with a combination and conspiracy to fix prices and to eliminate competition in the sale of hand tools. That combination and conspiracy allegedly has included a continuing agreement among the defendants to maintain uniform, non-competitive prices; to standardize specifications; to adopt uniform basing points, shipping terms, and freight charges; and to require jobbers to adhere to resale prices established by the defendants. According to the indictment, the alleged combination and conspiracy had the effects of eliminating price competition in the sale of hand tools and of increasing prices of hand tools.

U. S. v. *The Gemex Corporation* (U. S. D. C. E. D. N. J., Complaint, December 16, 1958).

Attorney General William P. Rogers announced that a civil antitrust suit was filed in the Federal Court at Newark, New Jersey, against The Gemex Corporation of Union, New Jersey, charging it with a violation of Section 1 of the Sherman Act in connection with the manufacture and sale of watchbands.

The complaint alleges that The Gemex Corporation, one of the principal manufacturers of watchbands in the United States, agreed with its wholesalers: (a) to fix, maintain and stabilize the prices for the sale of watchbands to retailers; (b) to maintain prices of watchbands manufactured by others than defendant on sales to retailers; (c) to refrain from handling watchbands manufactured by others than defendant which compete in the same price range as Gemex watchbands; and (d) to police adherence to the agreements by reporting infractions thereof by wholesalers and by refusing to sell to wholesalers who deviate from the agreed upon sales policies.

The sales of Gemex watchbands to wholesalers, according to the suit, total approximately $4,000,000 per year. As a result of the violation charged in the complaint, it is alleged that competition has been eliminated between wholesalers in the sale of Gemex watchbands and in the sale of watchbands manufactured by competitors of the defendant; that retailers have been denied the benefits of free and open price competition; and that wholesalers have been

prevented from handling competitive watchbands of their own choice. The suit seeks injunctive relief against the various practices alleged.

U. S. v. *Fur Shearers Guild, Inc., et al.* (U. S. D. C. S. D. N. Y., Complaint, December 16, 1958).

Attorney General William P. Rogers announced the filing of an antitrust indictment and companion civil antitrust complaint in the United States District Court for the Southern District of New York, alleging illegal trade restraints in the sale of fur shearing services to the manufacturers of fur sheared garments.

The defendants named in the indictment and the companion civil complaint were the Fur Shearers Guild, Inc., of New York City, an association of fur shearers, as well as individual defendants.

According to the indictment and the companion civil complaint, the individual defendants have ownership interests in the six fur shearing concerns that comprise the Fur Shearers Guild, Inc. They constitute almost all of the fur shearers doing business in the United States.

It was charged in the indictment and the companion civil complaint that the defendants, whose services are essential to the existence of the sheared fur garment industry (which grosses about $20 million annually), violated the Sherman Antitrust Act by engaging in a combination and conspiracy to fix and establish the prices to be charged manufacturers of sheared fur garments and to require such manufacturers to enter written contracts with the defendant Fur Shearers Guild, Inc. binding them to obtain their fur shearing services exclusively from members of the Fur Shearers Guild, Inc., thereby eliminating all non-member fur shearers as competitors.

Federal Trade Commission Activities

F. T. C. v. *Ronson Corp., et al.* (F. T. C. Dkt. #7066, Consent order, January 23, 1959).

The Federal Trade Commission approved an order requiring Ronson Corp., Newark, N. J., one of the nation's major producers of cigar and cigarette lighters and accessories and electric shavers, to stop entering into illegal price-fixing agreements with its retail distributors. The respondent was further ordered to discontinue discriminating among its customers in prices and promotional allowances.

Joined in the order are subsidiaries of Ronson.

In taking this action, the Commission adopted an initial decision by Hearing Examiner John Lewis, based on an order agreed to by the concerns and the F. T. C.'s Bureau of Litigation.

The Commission recently issued consent orders against three other major manufacturers of electric shavers who compete with Ronson. Ronson's agreement was conditioned upon the issuance of these orders.

The F. T. C. complaint, issued February 19, 1958, said Ronson entered into retail price-fixing contracts (Fair Trade Agreements) with many retail dealers in states having Fair Trade Laws. These agreements were alleged to be illegal in that Ronson and the subsidiaries compete with some of these retailers, whose prices for Ronson products are set by Ronson.

The complaint also had charged that Ronson paid promotional allowances to some, but not all, of its customers, and granted these allowances on unequal terms, in violation of Section 2(d) of the Robinson-Patman Amendment to the Clayton Act. The order requires the companies to stop furnishing these allowances to any of their customers unless they are made available on a proportionally equal basis to all other customers competing with the favored customers.

In ordering Ronson to stop discriminating in prices to their respective customers who compete with each other in reselling the products, the hearing examiner dismissed allegations that some retail customers of Ronson's wholesale purchasers were among the purchasers allegedly discriminated against pricewise because they were legally the customers of the manufacturer.

F. T. C. v. *Jantzen, Inc.* (F. T. C. Dkt. #7247, Consent order, January 28, 1959).

The Federal Trade Commission has approved a consent order requiring Jantzen, Inc., Portland, Oregon, to stop discriminating among its customers in paying advertising allowances.

Taking final action on its complaint of September 4, 1958, the Commission adopted an initial decision by Hearing Examiner Loren H. Laughlin based on an order agreed to by the company and the F. T. C.'s Bureau of Litigation.

Jantzen was charged with making illegal payments under its standard cooperative newspaper agreements covering its summer wear and sweater lines. Favored retailers, the complaint alleged, were paid 50% of advertising costs up to 5% of total net purchases provided a season's initial order of this merchandise is $5,000 or more.

The complaint charged that these payments were not made available on proportionally equal terms to all competing retailers, as required by Section 2(d) of the amended Clayton Act.

The order provides that Jantzen's future advertising payments must be in accord with Section 2(d).

F. T. C. v. *Bill the Distributor, Inc., et al.* (F. T. C. Dkt. #7379, Complaint, February 6, 1959).

The Federal Trade Commission charged four affiliated Southeastern concerns with illegal receipt of brokerage on purchases of food products.

Named in the F. T. C.'s complaint are two wholesale food distributors, Bill the Distributor, Inc., and Winter Garden Sales Co., Inc.; two food brokers, Food Marketers, Inc., of Mississippi and Mid-South Food Products, Inc.; and William Thomas Hogg, the president and majority shareholder of the first three concerns and the manager of the latter. Food Marketers has its office at 3900 Tchoupitoulas St., New Orleans, La., and all the other respondents are located at 431 South West St., Jackson, Miss.

For example, the complaint says, during 1957 and 1958 the two wholesalers made many purchases from their suppliers through their controlled intermediaries, Food Marketers and Mid-South. In these transactions, the latter received brokerage fees from the suppliers as independent brokers although they were acting for the buyer wholesalers and were subject to their direct or indirect control through Mr. Hogg, the complaint alleges.

These practices violate Section 2(c) of the Robinson-Patman Amendment to the Clayton Act, the complaint charges.

F. T. C. v. *Shell Oil Co.* (F. T. C. Dkt. #7044, Init. Dec., February 5, 1959).

An order issued by a Federal Trade Commission hearing examiner would dismiss, for failure of proof, charges that Shell Oil

Co., New York City, has illegally lessened competition by furnishing major lubrication equipment to its new car dealer customers.

Examiner Earl J. Kolb ruled that the lease or sale by Shell of this equipment to the dealers, with payments amortized over an agreed period by crediting from 5¢ to 15¢ per gallon of oil and grease purchased, has not injured Shell's competitors.

After pointing out that the complaint attacked this practice on the theory it induces many dealers to buy Shell's petroleum products exclusively and to refuse to handle or stop handling competitive products, the examiner held:

"The equipment and lubricant contracts used by the respondent were designed to assist in the sale of oil to car dealers, but did not in fact exclude competitors from selling the car dealer customer. In fact, car dealers were required by customer preference and demand to maintain a substantial stock of 'Premium' oils which were usually carried in package form. .There is nothing in the contract which prohibits the car dealer from buying from competitors. In fact, at least two representatives of respondent's competitors testified in this proceeding that they were able to sell certain car dealers with whom respondent had contracts or had split the business of certain dealers with respondent. Furthermore, it was a common practice in the industry for dealers to change suppliers during the term of the contract, the new supplier buying the equipment from the old supplier."

Four of the six competitors of Shell who testified showed a business increase in recent years, the examiner stressed. Nor can the losses incurred by the other two, he continued, be attributed to Shell's practices, for these reasons:

There was a decline in the number of new car dealers and new car sales (directly bearing on motor oil purchases by dealers since their warranty service brings new car buyers back for the first few oil changes); the one customer lost no accounts to Shell while the other lost three but also took three away from Shell.

Further noting that the latter competitor had bid unsuccessfully against Shell on three occasions, the examiner commented: "This is not sufficient to support a reasonable inference that a drop of 93,000 gallons from 1954 to 1957 in the New England area was due to the practices of the respondent, particularly when it appears that

from 1952 to 1954 . . . [the competitor] increased its sales by approximately 290,500 gallons."

The complaint also suggested that because Shell's nationwide gross sales topped $1 billion, it was in a position to use its large financial resources to restrain competition, noted the examiner.

This theory cannot be accepted "in the absence of proof that the practices engaged in are in themselves illegal, regardless of the size of the respondent," ruled the examiner.

F. T. C. v. *Minnesota Mining and Mfg. Co.* (F. T. C. Dkt. #7079, Init. Dec., February 6, 1959).

A Federal Trade Commission hearing examiner issued an order which would dismiss charges that Minnesota Mining and Manufacturing Co., St. Paul, Minn., has unlawfully conspired to fix prices of flat gummed paper.

Finding that a former subsidiary participated in the conspiracy and not the company, Examiner Earl J. Kolb ruled that Minnesota was not responsible for the subsidiary's practices and had discontinued them upon dissolving it on November 30, 1957, several months prior to the F. T. C.'s complaint of March 3, 1958.

The complaint alleged that Minnesota, together with six other principal members of The Gummed Industries Association, Inc., New York City, fixed identical prices and selling terms for gummed paper throughout the country, and used the Association as a clearing house to exchange price and discount information.

The other respondents agreed to a consent order forbidding these restrictive practices in the future, which was affirmed by the Commission last October 8.

According to the examiner, Minnesota admitted in a stipulation that Mid-States Gummed Paper Co. engaged in the complained-of practices. Mid-States was acquired by Minnesota in September, 1944, and operated as a wholly-owned subsidiary until the dissolution when it was made a division of Minnesota.

The evidence shows, said the examiner, Minnesota "did not ratify the alleged unlawful acts and practices of Mid-States, but instead immediately discontinued the prices and pricing system previously followed by Mid-States."

Nor does the record establish that Minnesota's control over Mid-States was sufficient to hold it responsible for the subsidiary's acts, he continued, citing these supporting facts:

After the acquisition, Mid-States continued to operate as an independent company under the direction of its original officers and personnel. Although some Minnesota directors were also directors of the subsidiary at various times, only one of the parent's officers became an officer of Mid-States, and this did not occur until late 1956.

F. T. C. v. *AllianceWare, Inc.* (F. T. C. Dkt. #7365, Complaint, February 2, 1959).

The Federal Trade Commission charged AllianceWare, Inc., Alliance, Ohio, a large manufacturer of porcelain-on-steel bathtubs, lavatories, and sinks, with giving illegal price advantages to one of its 850 wholesaler customers, Crane Co., Chicago, Ill. Also named as a respondent is AllianceWare's parent, American Metal Products Co., Detroit, Mich.

The F. T. C.'s complaint further charges that Crane violated the law by knowingly inducing and receiving the unlawful discounts. The subsidiary's challenged practices "were pursued with the knowledge, approval and at the behest of" American Metal, the complaint declares.

The charges stem from the formal contracts between AllianceWare and Crane providing discounts to the latter from the prices paid by all other AllianceWare customers. Specifically, the complaint alleges, Crane was charged 5% less than competing plumbing supplies wholesalers from March 1, 1947 to March 1, 1957; 12½% to 15% less from March 1, 1957 to March 1, 1958; and 7½% and 12½% less from March 1, 1958 to the present.

The complaint further charges that in several trading areas AllianceWare has designated one or two wholesaler customers as "stocking jobbers" and gives them a 5% discount or rebate from the list prices it charges competing wholesalers in these areas.

Charging AllianceWare with violation of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act, the complaint alleges that the effect of the company's price discriminations may be substantially to destroy competition between (1) it and competing sellers of similar products, (2) Crane and all other AllianceWare

wholesaler customers, and (3) "stocking jobbers" and all other AllianceWare wholesaler customers.

Crane is charged with having violated Section 2(f) of the law by inducing and receiving these favored prices which it "knows, or has reason to know" are discriminatory.

According to the complaint, AllianceWare makes the products in several plants throughout the country, and its 1957 sales topped Ave., Chicago, surpassed $378 million in total sales in 1957. Crane $7 million. Crane, which has its main office at 836 South Michigan owns and operates about 150 branches through which it wholesales both the plumbing supplies purchased from AllianceWare and those manufactured by itself.

F. T. C. v. *Sun Oil Co.* (F. T. C. Dkt. #6641, Order, January 19, 1959).

The Federal Trade Commission ordered Sun Oil Co., Philadelphia, Pa., to stop charging any of its service station customers less for gasoline and other petroleum products than it charges competing dealers in the same marketing area. The company also was ordered to stop conspiring illegally to fix the resale price for its products.

Adopting an initial decision by Hearing Examiner Robert L. Piper, the Commission ruled that Sun Oil's price cut on gasoline to one dealer in the Jacksonville, Fla., area, Gilbert V. McLean, resulted in a loss of business to competing Sun Oil filling stations. This competitive injury was found to violate Section 2(a) of the Robinson-Patman Amendment to the Clayton Act.

The Commission further held that Sun Oil violated Section 5 of the F. T. C. Act by conspiring with Mr. McLean to fix the retail price of the gasoline.

Chairman John W. Gwynne said, in the F. T. C.'s opinion accompanying the order, that Super-Test Oil Co., selling a non-major brand of gasoline, opened a new station across the street from Mr. McLean in June 1955. Because of Super-Test's lower prices (usually 26.9¢ per gallon and occasionally as low as 21.9¢), Mr. McLean, who sold at 28.9¢ per gallon, lost business and appealed to Sun Oil for help. On December 27, 1955, when Super-Test dropped its price to 24.9¢, the company gave Mr. McLean a discount of 1.7¢ a gallon and he cut his price to 25.9¢. Sun Oil did not give this discount to any other retail dealer in the area.

The Commission rejected the company's two-fold argument that the evidence does not establish (1) that it discriminated in price between customers who are competitors within the meaning of Section 2(a), and (2) that the price differential was such as to create a probability of substantially lessening competition.

The month following the lower price, Chairman Gwynne's opinion pointed out, Mr. McLean sold 32,100 gallons while his sales for the previous five months ranged from 5,900 to 8,300 gallons. One Sun dealer, less than a mile from him sold substantially less gasoline for the first two weeks of January than in the previous month; while another dealer, about 2½ miles from McLean, dropped from 17,000 or 18,000 gallons a month to 14,500.

In addition, continued the opinion, all the dealers who testified "gave instances of loss of specific customers" and some asked for a similar price reduction to combat their loss of business.

"Here," stated Chairman Gwynne, "we have a number of small independent retailers selling an identical product at the same price and under substantially the same conditions. All were operating at a small margin of profit and in an area which was a reservoir of potential customers who, because of the geographic situation, had easy access to that dealer who offered an advantage in price or in services rendered. When such a situation is shown to exist, together with proof that one competitor received a discount from a common supplier, an inference of injury to the others may reasonably be drawn from that fact. . . ."

Sun Oil also argued the lower price was a good faith meeting of competition, a defense provided by Section 2(b) of the amended Clayton Act. Overruling this argument, the Commission held:

"The discount . . . was not made to meet a lower price made . . . by another supplier. It was given to enable McLean to meet the competition of the Super-Test station across the street. Respondent would justify broadening the proviso of Section 2(b) to cover this situation on the theory that respondent and its dealer McLean were, in fact, competing as a unit with other channels of competition."

The Commission upheld the examiner's ruling that Sun Oil had entered into a price-fixing agreement with Mr. McLean, as alleged in the F. T. C.'s complaint of September 26, 1956. The

examiner had concluded from Mr. McLean's testimony that Sun Oil's salesman had advised him that "he would be given a price adjustment of 1.7¢ per gallon if he would absorb 1.3¢ himself and drop his retail price to 25.9¢."

After noting that the examiner had the opportunity to observe the witnesses as they testified, Chairman Gwynne said these other facts in the record support this conclusion: McLean apparently needed only a 2¢ margin to compete with Super-Test, which, of course, would have given him greater profits. Two of the dealer witnesses testified that he was dissatisfied with the arrangement and told them he was selling a lot of gas, doing a lot of work, but not making much profit. He went out of business about February 18, 1956.

"These facts lend support to the view that in posting his price, McLean was complying with an agreement, rather than acting as a free agent," Chairman Gwynne commented.

The Commission also rejected the company's contention that even if a price-fixing agreement were made, it was legal under the McGuire Act, which authorizes agreements fixing minimum resale prices for branded products where permitted by state law.

Florida's Supreme Court ruled in two cases that resale agreements were contrary to public policy announced by the Florida Constitution and statutes, said Chairman Gwynne. Although both cases concerned "non-signers," the decisions were not put on that ground, he added.

Also, he noted, a Circuit Court of Appeals said in another case involving non-signers that "it may well be that Fair Trade Contracts are unenforceable in Florida even between the parties . . ."

Even though the Florida Fair Trade statute is considered constitutional and enforceable as to agreeing parties, Chairman Gwynne held, "It does not give a buyer and a seller a free hand to make what contract they wish as to agreed price and thus virtually repeal the general policy of Florida against price-fixing.

"The agreement between respondent and McLean was not for the purpose of establishing a minimum resale price. On the contrary, it was a contract under which the parties jointly agreed to share the loss of profits incident to selling gasoline at a lower price. It was obviously not made with the Florida Fair Trade Act in mind.

Nor can it derive any protection from it. Consequently, the condition laid down in the McGuire Act which is necessary for immunity from Sherman Act attack has not been met and the Act is not available to respondent."

F. T. C. v. *Photostat Corp.* (F. T. C. Dkt. #7349, Complaint, January 19, 1959).

The Federal Trade Commission charged Photostat Corp., the nation's largest seller of photographic copying machines and their supplies, with illegally inducing owners and operators of the machines to stop buying from the corporation's competitors or to buy less from them.

Photostat's main office is at Providence, R. I., and its sales office and factory is at Rochester, N. Y. It manufactures the machines, but the photocopy paper and chemicals used in them are made for it by Eastman Kodak Co.

A Commission complaint alleges that Photostat has used its dominant position to monopolize the sale of these supplies by imposing unreasonable tying arrangements on Photostat machine owners. This unlawful conduct has restrained trade and is an unfair method of competition prohibited by Section 5 of the F. T. C. Act, the complaint states.

According to the complaint, Photostat renders prompt and efficient repair and maintenance service, without a service charge for labor, only to those purchasing all or substantially all their photocopy supplies from it. The company not only charges other owners labor fees ($6 an hour on local calls, and from $74 to $116 the first day, plus $60 each additional day, on calls within a 450 mile radius of one of its 22 branch offices) but also gives them less efficient service.

Photostat further is charged with unfairly restricting the sale of repair parts to competing sellers of the supplies, thus causing costly delays to their customers. It sells parts to these competitors only on condition that they furnish the design, model, and serial number of the machine on which the parts will be used, the complaint says.

Using this confidential information to identify competitors' customers, the company tries to have them resume business with it and stop buying the supplies from competitors, the complaint alleges.

The complaint notes that prompt and efficient service is essential in keeping Photostat machines in proper operating service, and the availability of such service is an important consideration to machine owners.

Other alleged effects of these practices are that Photostat can control the repair and servicing of substantially all the Photostat machines in operation, and competitors are foreclosed from bidding against it in the sale of photocopy supplies to government agencies requiring the seller to repair and service the machines.

Illustrating the company's dominance, the complaint states, is the fact that in 1956 it enjoyed better than 51% (over $12.4 million) of the total sales of photocopy paper. Photostat's total sales in that year approached $17.5 million, of which chemicals accounted for more than $1 million, and machines and parts for better than $2.6 million.

F. T. C. v. *Puget Sound Brokerage Co.* (F. T. C. Dkt. #7151, Init. Dec., January 7, 1959).

An order was issued by a Federal Trade Commission hearing examiner which would require Puget Sound Brokerage Co., Seattle, Wash., a primary broker of seafood products, to stop illegally passing on its brokerage earnings to customers.

Examiner Abner E. Lipscomb ruled that the firm, which is the partnership of Helen E. Hinde and Elizabeth B. Swenson, has granted direct and indirect price concessions, rebates, and allowances in lieu of brokerage. Holding these practices to be in violation of Section 2(c) of the Robinson-Patman Amendment to the Clayton Act, he ordered them stopped.

"The courts have consistently held that it is a violation of Section 2(c) . . . to pay or to pass on brokerage to a buyer in any guise whatsoever," the examiner pointed out.

As alleged in the F. T. C.'s complaint of May 20, 1958, the examiner found, the partners have made the unlawful payments by: (1) selling at net prices lower than those accounted for to their packer-principals, (2) granting price deductions through allowances or rebates, wholly or partly not charged back to the packers,

and (3) taking reduced brokerage on sales involving price concessions.

For example, he said, the partners invoiced to American Stores 200 cartons of salmon at $20.50 per carton but accounted for this sale to their packer principal at $21.00, absorbing the 50¢ per case difference out of their brokerage.

Another invoice in the record covering 1,250 cans of salmon sold to a Detroit customer, continued Examiner Lipscomb, shows $1,168.17 freight prepaid by the partners, while they actually paid "$1,293.17, or $125.00 more, which represents 10¢ a case promotional allowance granted to the purchaser in the form of a freight rebate."

The evidence further establishes that Puget Sound had a contract with a buying subsidiary of The Great Atlantic & Pacific Tea Co., providing for a 50¢ per case lower price on all listed items, he said. On these sales, the firm received only 3% brokerage instead of the usual 5%, he added.

F. T. C. v. *Barbey Packing Corp., et al.* (F. T. C. Dkt. #7203, Consent order, January 7, 1959).

The Federal Trade Commission approved a consent order requiring Barbey Packing Corp. and its officers to stop making illegal brokerage payments to favored buyers.

The Commission adopted an initial decision by Hearing Examiner Abner E. Lipscomb based on an order agreed to by the company and the Commission's Bureau of Litigation.

A Commission complaint, issued last July 22, had charged Barbey with making direct sales to some buyers without utilizing brokers and giving price reductions approximating the brokerage fees which otherwise would have been paid.

Barbey also was charged with making some sales only through field brokers and reducing the selling price by the amount of the commissions which would have been earned by primary brokers.

The complaint had charged that these practices violate Section 2(c) of the Robinson-Patman Amendment to the Clayton Act.

The order prohibits such practices in the future.

F. T. C. v. *Simon Hafner* (F. T. C. Dkt. #6961, Consent order, December 19, 1958).

The Federal Trade Commission has approved a consent order requiring Simon Hafner, doing business as Hafner Coffee Co., Pittsburgh, Pa., to stop discriminating among his customers in paying promotional allowances.

In taking this action, the Commission adopted an initial decision by Hearing Examiner Loren H. Laughlin based on an order agreed to by Mr. Hafner and the F. T. C.'s Bureau of Litigation.

The F. T. C.'s complaint of November 26, 1957, as amended by the examiner on July 25, 1958, alleged to be illegal the $750 advertising allowance Mr. Hafner paid to Century Food Markets Co., Youngstown, Ohio, for an anniversary promotion. Like payments, the complaint charged, were not made available on proportionally equal terms to all customers competing with Century, as is required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

The order provides that future payments must be made on a proportionally equal basis only.

F. T. C. v. *Keystone Wire Cloth Co.* (F. T. C. Dkt. #7297, Complaint, November 24, 1958).

The Federal Trade Commission charged that sales of wire screen made by Keystone Wire Cloth Co., Hanover, Pa., to Sherwatt Equipment & Manufacturing Co., Inc., New York City, handled by broker Arthur Watts, who also is Sherwatt's president and majority stockholder, involved illegal brokerage.

Alleging that Mr. Watts has accepted brokerage fees ranging from 2 to 4% in these transactions, the F. T. C.'s complaint charges that his acceptance of the fees has the same effect as if Sherwatt had received the brokerage and turned it over to Mr. Watts. This practice is outlawed by Section 2(c) of the Robinson-Patman Amendment to the Clayton Act.

The complaint says that Keystone's yearly gross sales amount to about $3,500,000, while Sherwatt's total $500,000. Both Sherwatt and Mr. Watts have their offices at 47 Murray St., New York City.

F. T. C. v. *Neapco Products, Inc.* (F. T. C. Dkt. #6891, Consent order, November 24, 1958).

The Federal Trade Commission approved a consent order requiring Neapco Products, Inc., Cross and South Sts., Pottstown, Pa., a manufacturer of automotive parts, to stop giving illegal price advantages to favored customers.

The Commission adopted an initial decision by Hearing Examiner Frank Hier based on an order agreed to by the company and the F. T. C.'s Bureau of Litigation.

In its complaint of September 17, 1957, the Commission charged that Neapco's 2% to 10% rebate schedule, based on total purchases, results in small independent wholesalers paying higher prices than heavier-buying independent competitors.

Prior to January, 1955, the company favored wholesaler-members of buying groups over both large and small independents by permitting them to aggregate purchases of all members to get a bigger discount, the complaint alleged. Since that time, it added, Neapco granted the group wholesalers 15% discount on all purchases, although holding the independents to the 2%-10% schedule.

These price discriminations violate Section 2(a) of the Robinson-Patman Amendment to the Clayton Act, the complaint concluded.

The order provides that Neapco must charge the same net prices to customers who compete with each other in reselling its products for replacement purposes.

F. T. C. v. *G. P. Halferty & Co.* (F. T. C. Dkt. #7035, Consent order, December 8, 1958).

The Federal Trade Commission has approved a consent order requiring G. P. Halferty & Co., Seattle, Wash., to stop making brokerage payments which are forbidden by law.

Taking final action on its complaint of last January 14, the Commission affirmed an order by Hearing Examiner Abner E. Lipscomb which had been agreed to by the F. T. C.'s Bureau of Litigation and by the company and its president, Guy P. Halferty.

The complaint had charged that the firm had violated Section 2(c) of the Robinson-Patman Amendment to the Clayton Act by

giving favored customers reduced prices reflecting brokerage, or rebates in lieu of brokerage. Halferty not only sells its own pack of canned salmon and other seafood, but also acts as a primary broker for various packer principals, the complaint said.

For example, the complaint alleged, on direct sales not involving field brokers, at least one favored buyer of Halferty's own products was granted a 2½% rebate (the customary brokerage fee) under the guise of a promotional allowance; and in sales of other packers' seafood, the firm charged customers less than the prices accounted for to the packer.

The order forbids these practices in the future.

F. T. C. v. *C. F. Buelow Co.* (F. T. C. Dkt. #7154, Consent order, December 8, 1958).

Approval of a consent order requiring C. F. Buelow Co., Seattle, Wash., a primary broker of seafood, to stop favoring customers with illegal brokerage payments was announced by the Federal Trade Commission.

The order was agreed to by the firm and the F. T. C.'s Bureau of Litigation. It was contained in an initial decision by Hearing Examiner Abner E. Lipscomb which the Commission affirmed.

The company was charged by the Commission last May 26 with granting certain buyers rebates in lieu of brokerage or price concessions reflecting brokerage in violation of Section 2(c) of the Robinson-Patman Amendment to the Clayton Act.

Buelow either absorbed these rebates from its customary 5% brokerage fee, or shared them with the field broker involved out of the 2½% commission each receives, the complaint alleged.

Typical methods cited were selling at lower prices than those accounted for to packer-principals; granting price deductions wholly or partly not charged back to the packers; and taking reduced brokerage on sales involving price concessions.

F. T. C. v. *Whiz Fish Products Co.* (F. T. C. Dkt. #7089, Consent order, December 8, 1958).

Approval of a consent order was announced by the Federal Trade Commission forbidding Whiz Fish Products Co., a packer and dis-

tributor of seafood of Seattle, Wash., to pay illegal brokerage to its customers.

After review, the Commission adopted an initial decision by Hearing Examiner Abner E. Lipscomb based on an order agreed to by the company and the F. T. C.'s Bureau of Litigation. The order also was consented to by the firm's officials, Charles D., Jack J., and Ike N. Alhadeff and is binding upon them.

In its complaint of March 20, 1958, the Commission charged that on direct sales not involving brokers, favored buyers were granted discounts or price reductions approximating the normal brokerage fee of 2½%.

In transactions handled through brokers, favored customers were given reductions offset by cutting the broker's commission, the complaint continued.

These arrangements were alleged to violate Section 2(c) of the Robinson-Patman Amendment to the Clayton Act, which prohibits the payment of discounts or allowances in lieu of brokerage.

F. T. C. v. *Longines-Wittnauer Watch Co., Inc., et al.* (F. T. C. Dkt. #7117, Consent order, December 8, 1958).

Longines-Wittnauer Watch Co., Inc., New York City, a major manufacturer of watches, and Associated Barr Stores, Inc., a large Philadelphia jewelry chain, were ordered by the Federal Trade Commission to discontinue an arrangement by which the watch company gave favored treatment to the retail outlet.

The Commission adopted an initial decision by Hearing Examiner Abner E. Lipscomb, based on an order agreed to by both corporations and the F. T. C.'s Bureau of Litigation.

Longines-Wittnauer was one of three suppliers charged by the F. T. C. last April 10 with paying special allowances to Barr for advertising their products, but not making such allowances available on proportionally equal terms to Barr's competitors. The complaint charged that this discriminatory practice violated Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

The chain and its president, Myer B. Barr, were charged in a second count of the complaint with violating Section 5 of the F. T. C. Act by soliciting these unlawful payments which "they knew or should have known" were not offered on proportionally equal terms to their competitors.

The order forbids Longines to pay allowances to any customer, and Barr knowingly to induce or accept allowances from any supplier, unless they are made available to all other competing customers on proportionally equal terms.

Joined in the order is Longines' wholly-owned subsidiary, Vacheron & Constantin-Le Coultre Watches, Inc., which also has its principal office at the Fifth Ave. address. In 1955 the sales of the two companies totaled over $20 million. Barr, whose sales exceeded $2.1 million for the fiscal year ending June 30, 1955, has its main office at 1112-14 Chestnut St., Philadelphia, Pa. Myer B. Barr is also joined in the order.

F. T. C. v. *Psychological Corp., et al.* (F. T. C. Dkt. #6967, Consent order, December 5, 1958).

The Federal Trade Commission approved a consent order requiring the nation's four largest publishers and distributors of vocational, aptitude, and psychological tests and related materials to stop preventing competitors from buying these products.

Named in the order are: Psychological Corp., 522 Fifth Ave., New York City; Science Research Associates, 57 W. Grand Ave., Chicago, Ill.; World Book Co., Yonkers-on-Hudson, N. Y.; and California Test Bureau, 5916 Hollywood Blvd., Los Angeles, Calif.

The Commission adopted an initial decision by Hearing Examiner Abner E. Lipscomb based on an order agreed to by the companies and the F. T. C.'s Bureau of Litigation.

The firms were charged by the Commission on November 29, 1957, with entering into restraint-of-trade agreements to boycott and refuse to sell to competitors conducting these tests by mail.

The order prohibits the firms from carrying out any planned course of action to refuse sale of the tests and materials to any prospective purchaser. Also, they must not prepare or maintain any lists of purchasers to whom they will not sell, or exchange information as to the names of such purchasers.

Among other things, the complaint had alleged that the companies prepared lists of mail-testing competitors and exchanged these lists as well as other information obtained by investigation of prospective purchasers.

Competitors, the complaint continued, were prevented from buying the tests and related materials, inasmuch as the respondents are

the only source of supply for many of these products and are in a position to control the distribution of substantially all of them.

F. T. C. v. *Sperry Rand Corp., et al.* (F. T. C. Dkts. #6701, 6892, 6900, Consent orders, November 17, 1958).

The Federal Trade Commission ordered three of the nation's leading manufacturers of electric shavers to stop discriminating among their customers in prices and promotional allowances. They are: Sperry Rand Corp., New York City (6701); Schick, Inc., and its wholly owned subsidiary, Schick Service, Inc., Lancaster, Pa. (6892); and North American Philips Co., Inc., New York City (6900).

Taking simultaneous corrective action, the Commission modified and then adopted separate initial decisions by its hearing examiners based on orders agreed to by the companies and by F. T. C.'s Bureau of Litigation.

In ordering each of the three to discontinue discriminating in prices to their respective customers who compete with each other in reselling the products, the Commission dismissed allegations that some purchasers allegedly discriminated against pricewise were the customers of these manufacturers.

The complaints had alleged, among other pricing discriminations, that purchasers who bought from the manufacturers' wholesalers were charged more than their competitors who bought direct from the respondents.

The orders further require Schick and North American to furnish demonstrator services to their customers on a proportionally equal basis.

Sperry Rand and Schick were also ordered to stop fixing and maintaining the prices at which their shavers are to be resold by wholesalers and retailers who are in competition with outlets owned or controlled by the manufacturers.

Finally, Schick must discontinue the use of misleading "free" claims.

F. T. C. v. *Oneida Ltd.* (F. T. C. Dkt. #7236, Init. Dec., November 17, 1958).

A Federal Trade Commission hearing examiner issued an order which would dismiss Commission charges that Oneida Ltd., Oneida,

N. Y., discriminates among its customers in granting promotional allowances.

Granting the firm's motion to dismiss, Hearing Examiner Frank Hier ruled that Oneida's challenged payments were abandoned ten months before it had knowledge of any charge of illegality against it and there is no reason to suspect resumption of such practices.

A Commission complaint, issued August 21, had charged that Oneida paid favored customers allowances for newspaper and television advertising which were not made available to all competing retailers on proportionally equal terms, as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

The firm submitted an affidavit which admitted that the challenged payments had been made and declared that this special TV promotion program had been a financial and commercial failure and the firm had voluntarily terminated it. The affidavit further stated that in June, 1957 Oneida discontinued all advertising allowances of any kind or character. At a hearing held on October 31, 1958, testimony was adduced which confirmed the affidavit.

Examiner Hier concluded that, since the challenged practices have been voluntarily abandoned, there is no public interest in further proceedings.

F. T. C. v. *Keystone Mfg. Co., et al.* (F. T. C. Dkt. #7118, Init. Dec., November 17, 1958).

A Federal Trade Commission hearing examiner issued an order which would prohibit Keystone Mfg. Co. and its wholly-owned subsidiary, Keystone Camera Co., both of Hallet Square, Boston, Mass., from granting promotional allowances to its customers for cameras and photographic equipment except on a proportionally equal basis.

In his decision Examiner Abner E. Lipscomb accepted a stipulation entered into by counsel for both sides. This stipulation is not an admission by the firms that they have violated the law.

According to the stipulation, Keystone in November and December, 1955, offered a plan of installing Christmas window displays of their products to customers making purchases in specified amounts. To buyers who could not advantageously use such displays, the firms offered an additional 50% advertising allowance above the usual 50% normally tendered its customers. The examiner ruled that since this service was not offered buyers who had accepted the window

displays, Keystone gave the favored firms an economic advantage and thus violated Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

The stipulation further shows that in December, 1956 the firms offered a special $550 allowance to settle a dispute with a favored buyer. The grant was to cover the cost of a special advertisement placed in a widely-read newspaper, and was not offered to competing customers on a proportional basis, the examiner said.

Keystone declared that the alleged violations were trivial inasmuch as they totaled only $975 while the firms' total sales exceed $10 million annually.

In denying this motion, Examiner Lipscomb ruled that the allowances, while "appearing negligible in proportion to the total business of the grantor, may well represent a much more considerable portion of the business of the grantee's small competitors, to whom they were not made available, thus resulting in substantial injury to such small businesses, and thereby to competition in commerce, which is of itself injurious to the public interest."

F. T. C. v. *Liggett & Myers Tobacco Co., Inc.* (F. T. C. Dkt. #6642, Init. Dec., December 11, 1958).

A Federal Trade Commission hearing examiner issued an order which would prevent Liggett & Myers Tobacco Co., Inc., New York City, from granting allowances for services or facilities to customers except upon a proportionally equal basis.

The examiner, J. Earl Cox, found that the company paid to customers and non-customer purchasers over $1 million in allowances for point of sale displays and advertising in 1955 but did not give allowances to some competing customers on a proportional basis and gave none at all to others. He held that this discrimination violates Section 2(d) of the Robinson-Patman Amendment to the Clayton Act, which requires such payments to be made available on a proportionally equal basis to all competing customers.

For example, he said, under a one-year contract dated February 13, 1956, Metropolitan Tobacco Co., a New York City tobacco wholesaler, was granted allowances totaling $67,600. During this period, five customers in the same area received no payments. The contract with Metropolitan was not renewed at the end of the year.

Examiner Cox held that "the fact that respondent's competitors engaged in the same practice by making payments to the same wholesaler does not constitute a defense; nor do the facts and circumstances of abandonment negate the requirement or necessity of issuance of a cease-and-desist order under the policy announced by the Commission in its decisions in substantially similar cases."

In 1953 the respondent engaged The Harrough Corp., of New York City, to place its cigarettes in vending machines. Harrough paid vending machine operators a designated rate per month for each machine dispensing only matches advertising Liggett & Myers' products. In 1955, these payments totaled over $5,270,000.

The examiner ruled that these payments were in reality paid by the respondent and not by Harrough and that Liggett & Myers is responsible for any illegality which results.

He found that some vending machine operators receiving these payments were in competition with over-the-counter retailers who did not receive any. Examiner Cox ruled that "in this respect respondent failed to comply with Section 2(d) of the Clayton Act."

Although the evidence did not establish that the allowances were not available to all competing over-the-counter retailers, the examiner did find that the payments were not made available on a proportional basis. He said that "they were arranged through individual negotiations between respondent and its various customers." Such discriminatory payments violate Section 2(d), he ruled.

On the other hand, he ruled that the evidence failed to substantiate the charges in the F. T. C.'s complaint of September 28, 1956, that vending machine operators were not treated equally in the distribution of allowances. Ruling that these operators are not in competition with wholesalers within the meaning of Section 2(d), he pointed out that the former sell directly to the public while the latter sell to retailers.

The order requires the company to make all future promotional allowances available to competing customers on a proportionally equal basis.

F. T. C. v. *Brillo Manufacturing Co., Inc.* (F. T. C. Dkt. #6557, Init. Dec., December 11, 1958).

A Federal Trade Commission hearing examiner order dismissed, for failure of proof, charges that Brillo Manufacturing Co., Inc.,

Brooklyn, N. Y., violated the antimerger law, Section 7 of the Clayton Act, by acquiring a competitor, The Williams Co., London, Ohio, in July, 1955.

In a previous initial decision, Examiner Robert L. Piper had granted Brillo's motion to dismiss the F. T. C.'s complaint of May 22, 1956, as to the household market, and denied it as to the industrial market, the two relevant markets he found to be involved.

The Commission later reversed this decision and remanded the case to the examiner for further proceedings. It disagreed with his ruling that the acquisition automatically established a reasonable probability of lessening of competition in that it significantly increased Brillo's already substantial share of the industrial steel wool market (from 29% to better than 47%).

Holding that this does not automatically establish a violation of amended Section 7 the Commission set forth factors which could be used in determining whether the acquisition had the prescribed anticompetitive effects. It said, "In addition to the facts concerning market shares, likewise important is such evidence as was received herein pertaining to the general competitive situation, number of competitors and degree of concentration prevailing in the industry."

The Commission also took issue with the examiner's corollary ruling that the acquisition could not possibly lessen competition in the household steel wool market because substantial competition did not exist previously between the two companies. (In 1954, Brillo's share of this market was 45.3% and Williams', 3/10 of 1%.) The examiner, the Commission held, should have considered "other relevant market information of record, including post-acquisition production and marketing data."

Applying these criteria, Examiner Piper ruled in today's decision that "the record fails to establish that the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7."

Brillo, he said, is the No. 1 producer of industrial steel wool but is not, as the complaint alleged, the "dominant" producer, if this means the dictionary definitions, "ruling" or "controlling."

In the industrial market, the examiner held, the record establishes that, contrary to contentions of counsel supporting the complaint, Brillo has not (1) exercised price leadership, (2) depressed prices unduly, (3) tried to keep for itself markets for new uses of steel

wool, or (4) used different pricing practices than competitors on government-bid business.

He further found that industrial steel wool accounts for less than 20% of the steel wool market and total sales are only about $5 million a year. Although there are only seven producers, this is about the same number there have been for many years; and it is not difficult to enter the business.

The examiner pointed out that although the acquisition eliminated one competitor, two other producers have entered the field in recent years, one since the acquisition. The record shows that the only Brillo competitor in poor financial condition is the new entrant, which "necessarily incurred substantial non-recurring pre-production expenditures in order to gain entry."

"Considering the size of the industrial market," said the examiner, "the number of competitors is relatively large and there does not appear to be any undue degree of concentration. The industrial market is highly competitive, and all of the witnesses called by the government testified that the competition was just as keen if not keener since the acquisition of Williams by respondent."

He rejected the contention of F. T. C. counsel that the acquisition enables Brillo to save prepaid freight costs to midwestern customers, and thus it can reduce prices with the effect of substantially lessening competition.

Assuming that Brillo reduced prices in the midwest to reflect its cost savings, the examiner reasoned, "this would enhance rather than lessen competition . . . uniform price reductions to the benefit of the public, while admittedly hard on weak competitors, are the very objective which the antitrust laws seek to preserve. To insulate weak competitors from the rigours of hard, fair competition is not the purpose of the antitrust laws, but rather the converse to encourage strong and unfettered competition, which enhances the public interest by producing better products at lower costs."

Turing to the household market, the examiner similarly stated that Brillo is not its dominant manufacturer as alleged, but is No. 2 with 45.3% of such sales in 1954, while S.O.S. enjoyed 50.9%.

The foregoing findings with respect to Brillo's alleged dominance, price leadership, depressing prices, government-bid business, new uses, financial condition of competitors, difficulty of entry, and in-

tensity of competition apply equally in the household steel wool market, said the examiner.

Moreover, he stated, success in this market depends on national advertising and obtaining shelf space in retail outlets. The evidence shows that the two other companies competing with Brillo and S.O.S. are unwilling or unable to make the necessary large advertising expenditures.

Added the examiner, "Unless consumer demand is created by such advertising, most of the retail outlets, because of limited shelf space, will not stock a household steel wool product."

In addition, neither Brillo's nor Williams' share of this market has increased since the acquisition, and in fact the latter's share decreased slightly the first full year after it was acquired, the examiner noted.

In his earlier decision, the examiner also had ruled that the relevant markets involved are industrial and household steel wool, in that these are the products made by Brillo and Williams and thus must constitute the area of effective competition between the two companies.

Holding that the examiner erred in determining, as a matter of law that industrial steel wool must be the line of commerce, the Commission said in remanding the case to him, "The test . . . is whether these products are shown by the facts to have such peculiar characteristics and uses as to constitute them sufficiently distinct from others to make them a 'line of commerce' within the meaning of the Act . . . That the acquired and acquiring corporations both made industrial steel wool was only one circumstance to be considered. Additional factors which could have been taken into account include data relating to the manner in which the products are marketed, their physical characteristics, prices and possibly other things bearing on the question of whether or not they may be distinguished competitively from other wares."

In the initial decision, Examiner Piper again ruled that industrial and household steel wool are the relevant markets involved. The record establishes that these products meet the test laid down by the Commission, he stated.

F. T. C. v. *Sav-A-Stop, Inc., et al.* (F. T. C. Dkt. #7317, Complaint, December 10, 1958).

The Federal Trade Commission charged Sav-A-Stop, Inc., a Jacksonville, Fla., "rack merchandiser" or wholesaler of drug proprietaries and toiletries, and two subsidiaries with discriminating in price among their customers and illegally inducing them to stop handling competitors' merchandise.

According to the complaint, the respondents initially were wholesalers of drug proprietaries and toiletries only. Upon gaining control of Jay Distributing, Sav-A-Stop, Inc., inaugurated a plan providing that customers would get an additional 3% discount on these products if they agreed to carry the household items distributed by Jay.

The complaint charges that the respondents grant this extra discount to favored customers without requiring them to carry these household items, while non-favored customers must carry the items to receive it.

The effect of these discriminations, the complaint alleges, may be substantially to lessen competition or tend to monopoly in violation of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act.

A further charge is that giving this additional discount to customers on one line of merchandise if they agree to carry a totally unrelated line is an unfair method of competition prohibited by Section 5 of the F. T. C. Act.

The complaint cites these specific effects of the unlawful sales program: Customers of competing wholesalers are induced to stop handling their household and other merchandise, and instead purchase it from respondents; Competing wholesalers of household lines are unreasonably injured and restrained.

F. T. C. v. *Diamond Crystal Salt Co.* (F. T. C. Dkt. #7323, Complaint, December 15, 1958).

Diamond Crystal Salt Co., St. Clair, Mich., one of the nation's five largest salt producers, was charged by the Federal Trade Commission with illegally acquiring a major competitor, Jefferson Island Salt Co., Louisville, Ky.

A Commission complaint charges that Diamond's acquisition of Jefferson on January 10, 1957, and their subsequent merger may

lessen competition or tend to monopoly in violation of the anti-merger law, Section 7 of the Clayton Act.

According to the Commission complaint, in 1955 Diamond was the fourth largest dry salt producer with shipments of 434,043 short tons and the third largest producer of evaporated salt in that its shipments represented 10.9% of all such salt sold or used by the salt-producing industry in the U. S.

Jefferson Island ranked sixth in dry salt production with 388,771 short tons and was the third largest producer of rock salt with 365,548 short tons, the complaint states.

The dry salt industry is highly concentrated, the complaint alleges, in that in 1955 the six largest manufacturers, including Diamond and Jefferson, shipped 7,281,859 short tons or 78.5% of the 9,280,249 short tons produced in the U. S. Although there were 62 dry salt producers in 1940, the number remaining in 1955 was 48.

The dry salt industry is difficult for a new producer to enter due to (1) heavy capital outlays for resources, plant, and equipment, (2) unavailability of commercially usable salt resources, (3) the inelasticity of demand for salt, (4) the high degree of concentration in the industry, and (5) the substantial idle capacity in the industry.

Prior to the 1957 acquisition, substantial competition allegedly existed between Jefferson and Diamond in the area east of the Mississippi, especially in a 9-state area in the South, consisting of the states of Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, Kentucky, and Tennessee. For example, the complaint charges, as a result of the merger, Diamond's share of the dry salt sales jumped from 3.6% to 25%, and its share of evaporated salt from 16.1% to 21.5% in this Southern area. Diamond and the two largest salt producers now control over 90% of the market for dry salt in this 9-state area.

Among other effects of the acquisition, the complaint alleges that single line producers of either crushed rock salt or evaporated salt that would otherwise have purchased from Jefferson may be caused to become dependent on Diamond, one of their principal competitors.

The complaint also charges that the acquisition eliminated actual and potential competition between Diamond and Jefferson and enhanced Diamond's competitive position over other dry salt producers.

Concentration in the industry is further increased, the complaint alleges, and the dominant position of Diamond and the two largest producers further discourages entry into the business.

F. T. C. v. ***Point Adams Packing Co., et al.*** (F. T. C. Dkt. #7210, Consent order, December 22, 1958).

The Federal Trade Commission approved a consent order requiring Point Adams Packing Co., Hammond, Oregon, and its Eastern broker, Trubenbach & Scheffold, Inc., New York City, to stop making illegal brokerage payments.

The Commission adopted an initial decision by Hearing Examiner Loren H. Laughlin containing an order agreed to by the companies and the Commission's Bureau of Litigation.

A Commission complaint, issued last July 23, charged the concerns with favoring certain buyers by (1) reducing net prices by approximately the brokerage commission; (2) giving them rebates or payments out of brokerage earnings for part of agreed-to promotional allowances; and (3) agreeing to pass on a part of the brokerage in sharing price reductions granted these buyers in the form of promotional allowances. The complaint had alleged that these practices violate Section 2(c) of the Robinson-Patman Amendment to the Clayton Act.

In a second count, the complaint charged that the concerns paid a $50-per-month promotional allowance to a Pennsylvania customer and a $750 allowance to a customer in New Jersey. These allowances were not granted to competing customers on a proportionally equal basis, as required by Section 2(d) of the law, the complaint maintained.

F. T. C. v. ***Erie Sand and Gravel Co.*** (F. T. C. Dkt. #6670, Init. Dec., December 17, 1958).

A Federal Trade Commission hearing examiner ruled that the acquisition by Erie Sand and Gravel Co., Erie, Pa., of the Sandusky Division of the Kelley Island Co. was illegal in that it gave Erie a potential monopoly of the lake sand market on the southern shore of Lake Erie.

Erie was ordered by Examiner Abner E. Lipscomb to divest itself absolutely of the assets acquired, except the equivalent of one of the vessels, so as to establish, as a competitive entity in the lake sand market, a unit comparable to the former Sandusky firm.

The acquisition, the examiner held, has these probable adverse effects forbidden by the anti-merger law, Section 7 of the Clayton Act: substantially lessening competition and tending to give Erie a monopoly in the sale of lake sand in the relevant market—the southern shore of Lake Erie from Buffalo, N. Y., to Sandusky, Ohio, extending up to twelve miles inland.

Erie purchased Sandusky in March, 1955, paying more than $1 million. The F. T. C.'s complaint challenging the acquisition was issued October 30, 1956.

According to the examiner, Sandusky was the largest producer of lake sand in this market area, accounting for 54.5% of the 1954 domestic production, and Erie was second with 37.3%. The two other domestic competitors' share of sales was a mere 4.97% and 3.03% respectively.

In addition to obtaining over 91% of the market, Erie received the following benefits as a result of the acquisition, said the examiner:

It became the only distributor of lake sand in the port cities of Dunkirk, N. Y., Sandusky, Ohio, and Erie, Pa., and the only producer selling in every port in the entire area. It increased its dredging equipment from one vessel to four, and acquired docks, by ownership or lease, in every major port in the area. (Dock space is a necessity to a lake sand producer.) Also, Erie eliminated an independent competitor by prohibiting Kelley Island Co. to re-enter the market for at least ten years.

Erie contended that pit, bank, and lake sand are all used primarily to make concrete and the sands are in competition. Therefore, it argued, lake sand is not a separate and distinct line of commerce within the intent or meaning of Section 7.

Rejecting this contention, Examiner Lipscomb held that bank and pit sand are not competitive with lake sand for several reasons.

Lake sand, he noted, is generally of finer quality and meets government-project specifications more consistently than other types. Although bank and pit sand are cheaper to produce, the prohibitive hauling expense in shipping into the lake-sand area would make them more expensive than lake sand, "while . . . quality would remain inferior." Also, he said, there is a demand for lake sand which the pit product cannot satisfy.

Denying Erie's further contention that this market area is not a "section of the country" under the statute, the examiner ruled: "The various phases of the business in question, such as the weight of the product involved in relation to its price, the high cost of transportation, the preference of purchasers for lake sand over pit or bank sand, the difference in price between bank sand and lake sand, result 'in effectively separating' the sand produced in the lake-shore area from the sand produced inland, and create a natural market for lake sand within a naturally-defined area which obviously can only be termed a 'section of the country' within the intent and meaning of Section 7 of the Clayton Act."

Since the acquisition, the examiner stated, not only has Erie refused to sell to certain persons, but also has increased the price to all customers beyond that at which it transfers sand from a subsidiary to itself. Pointing out that the evidence shows this transfer price had covered production cost plus a 17.6% gross profit, he commented:

"It appears, therefore, that such price increase, in part at least, resulted from Respondent's newly acquired dominance in the relevant market, rather than from a business or economic necessity."

It seems unlikely that real competition to Erie will develop since none of its competitors has more than one small dredging vessel, the examiner found, adding that they are further limited by a shortage of dock space.

The order would require Erie to divest itself of all the assets, properties, rights, leases, and privileges acquired, except the equivalent of one of the three vessels which was later sold and replaced with a much larger ship.

If Erie were ordered to divest itself of all three vessels, the examiner ruled, "it at once becomes apparent that the purchaser thereof will have acquired the potential monopoly which we are ordering Respondent to relinquish. Such a transfer of potential, instead of eliminating the tendency toward monopoly, might merely shift it from the Respondent to the purchaser."

F. T. C. v. *Associated Barr Stores, Inc.* (F. T. C. Dkt. #7118, Consent order, January 5, 1959).

The Federal Trade Commission has approved a consent order requiring Associated Barr Stores, Inc., a large jewelry chain of

Philadelphia, Pa., to stop knowingly inducing discriminatory advertising allowances from its suppliers.

In taking this action, the Commission adopted an earlier initial decision by Hearing Examiner Abner E. Lipscomb based on an order agreed to by the company and the F. T. C.'s Bureau of Litigation.

In its complaint of last April 10, the Commission alleged that Barr and its president, Myer B. Barr, knowingly induced Keystone Mfg. Co. and Keystone Camera Co., Boston, Mass., to grant allowances for advertising which "they knew or should have known" were not offered on proportionally equal terms to their competitors. This, the complaint alleged, is an unfair method of competition prohibited by Section 5 of the F. T. C. Act.

The Keystone companies were charged with failing to make proportionate payments available to other buyers competing with Barr, as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

The order forbids Barr knowingly to induce any supplier to grant allowances which are not made equally available to all other competing customers.

On October 31, 1958, Examiner Lipscomb issued another initial decision based on a stipulation entered into by Keystone and counsel supporting the complaint. Ruling Keystone's allowances to be discriminatory, he ordered that future payments be in accord with Section 2(d). Keystone has noted an appeal from this decision.

F. T. C. v. *American Motors Corp.* (F. T. C. Dkt. #7357, Complaint, January 22, 1959).

The Federal Trade Commission charged American Motors Corp., Detroit, Mich., a major manufacturer of electric appliances, with giving favored retail customers illegal price advantages over their competitors.

Also named in the F. T. C.'s complaint is American Motors' wholly-owned subsidiary, American Motors Sales Corp., which sells the parent's "Kelvinator" and "Leonard" appliances from 16 zone offices throughout the country.

During the past several years, including 1956 and 1957, the complaint charges, certain retailers were charged about 5% less than other competing retail customers. Concerns allegedly receiving

these lower prices include B. F. Goodrich Co., Akron, Ohio; Consumers Power Co., Jackson, Mich.; and Alabama Power Co., Birmingham, Ala.

The effect of these price discriminations has been substantially to lessen competition between the favored and non-favored retailers, the complaint concludes.

F. T. C. v. *William Freihofer Baking Co., et al.* (F. T. C. Dkt. #7072, Consent order, January 16, 1959).

The Federal Trade Commission approved a consent order requiring William Freihofer Baking Co. and its subsidiary, Imperial Foods, Inc., both of Philadelphia, Pa., to stop discriminating among their customers in prices and promotional allowances.

The Commission adopted an initial decision by Hearing Examiner John B. Poindexter based on an order agreed to by the companies and the F. T. C.'s Bureau of Litigation.

The Commission's complaint of February 27, 1958, charged the concerns with granting certain customers preferential discounts of up to 10% from the regular wholesale prices charged their non-favored competitors, in violation of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act. They also were charged with paying favored customers advertising and promotional allowances of up to 5% of purchases, but not making like payments available to all competitors on proportionally equal terms, as is required by Section 2(d) of the law.

The order forbids these activities in the future.

F. T. C. v. *Scott Paper Co.* (F. T. C. Dkt. #6559, Remand order, January 15, 1959).

The Federal Trade Commission has set aside a hearing examiner's initial decision which would have dismissed charges that Scott Paper Co., Chester, Pa., the nation's leading seller of sanitary paper products (toilet tissue, facial tissue, paper napkins, paper towels, and household waxed paper), illegally acquired three concerns in the paper industry.

The examiner had granted Scott's motion to dismiss made after conclusion of the evidence supporting the charges, ruling that a prima facie case had not been established.

In an opinion by Commissioner Edward T. Tait, the Commission granted an appeal by its trial counsel and remanded the case to Examiner William L. Pack for further proceedings. The Commission ruled that the examiner failed to apply the proper standard for determining whether a prima facie showing of the complained-of violations had been made.

Challenging the following three acquisitions, the F. T. C.'s complaint of June 1, 1956, had alleged their effect may be substantially to lessen competition or tend to create a monopoly, in violation of the antimerger law, Section 7 of the Clayton Act: (1) Soundview Pulp Co., Everett, Wash., a bleached sulphite pulp producer which was merged into Scott on November 9, 1951, by the issance of $60 million in stock; (2) Detroit Sulphite Pulp and Paper Co., Detroit, Mich., which manufactured base paper stock, and which Scott obtained on September 2, 1954, for stock valued at $11 million; and (3) Hollingsworth & Whitney Co., Boston, Mass., a producer of special industrial and converting papers which was acquired by Scott on October 27, 1954, in exchange for $38 million in stock.

The complaint further had charged that Scott's constant acquisition of companies and conversion of them to production of Scott products is prohibited by Section 5 of the F. T. C. Act.

Overruling the examiner, the Commission said it has set forth the test to be applied in determining the existence or non-existence of a prima facie showing in several previous decisions: "A hearing examiner in ruling on a motion to dismiss for failure of proof, made at the close of the case in chief, like a Federal district court in ruling on a similar motion in a non-jury trial, views the evidence and inferences reasonably to be drawn therefrom in the light most favorable to the complaint."

"In establishing a prima facie case," Commissioner Tait said, "we view the evidence and inferences reasonably to be drawn therefrom in the light most favorable to the complaint. Of course a respondent also has the further opportunity, at later stages of the proceeding, to rebut, dispel, or explain away the inferences in support of the allegations. Here the examiner gave but little if any recognition to favorable inferences and, moreover, emphasized those inferences against the complaint's allegations."

The Commission further held that a prima facie showing has been made that the entire United States is the "section of the country," within the meaning of Section 7 of the Clayton Act, as alleged in the complaint.

Taking issue with the examiner's finding that there is no effective nationwide area of competition, the Commission said:

"Scott is doing business throughout the entire United States, and so are its leading competitors. There is but little question that one of the acquisitions (Soundview) was made, in part, to put Scott on a more secure national footing. Also Scott's advertising appeal is directed to the whole nation and its resulting success appears to be inextricably tied to national merchandising efforts."

Although the examiner held that counsel supporting the complaint need only produce substantial evidence showing reasonable probabilities that the acquisition will have one or both of the effects prohibited by the statute, he failed to apply this standard but "in essence, looked for market control as such," the opinion stated. It added:

"There need be no showing that Scott had the power to fix prices or the power to control entry of new competitors; or that Scott had control of raw materials or the channels of distribution. Such power and control would amount to monopoly condemned by the Sherman Act."

Scott, commented Commissioner Tait, is the number one company in the industry. Its share of the market for all sanitary paper products increased from 26.76% in 1950 to 32.72% in 1955. Its share of resale industry products alone (88% of its business in 1955) jumped from 32% in 1950 to about 40% in 1955.

"Just how much of this increment may have resulted from the acquisitions we do not know with certainty. The record does not contain statistics for the intervening years 1951, 1952, 1953 and 1954 which would be of considerable benefit to a decision on the merits," the Commission said.

In the absence of rebuttal evidence, it went on, reasonable inferences favorable to the complaint might be made from these additional facts:

Market concentration in the sanitary paper products industry is high—Scott and the other three largest companies accounted for two-thirds of the business in 1955; Scott became a substantial seller

of pulp on the open market as a result of the mergers; from 1950 to 1955, its total sales increased from $97.7 million to $246.6 million. and its assets from $50 million to $225 million; in 1950, Scott purchased more than half its paper pulp requirements on the open market from various competing firms including Soundview and Detroit, and this competition has been reduced.

Soundview, the Commission's opinion noted, formerly shipped paper pulp to about 100 manufacturers, but the record does not clearly disclose whether any of these purchasers competed with Scott. Since Soundview was a substantial pulp producer in the West, its acquisition affected at least an important alternative or potential source of supply. Although Scott apparently has continued to supply them, it now holds the power to eliminate an important supplier, the opinion observed.

Continuing, it said: "While the foregoing will support inferences that, as a result of the acquisitions, competition in the production and sale of pulp may also be adversely affected, it does not appear that this particular phase of the record has been sufficiently developed. In order that the record may be clarified, the examiner should permit the receipt of such probative evidence as may be offered regarding the identification of paper manufacturers which relied upon the acquired firms as a source of pulp supply, whether they were competitors of the respondent, and other pertinent information as to this industry."

Turning to the Section 5 F. T. C. Act charge, the Commission ruled that the examiner erred in refusing offers of proof by counsel supporting the complaint that Scott attained its present position in the market substantially by acquisitions.

"The available evidence," concluded the opinion, "in support of counsel's contention in this connection is to be received and considered by the Hearing Examiner upon remand."

F. T. C. v. *Six-State Associates* (F. T. C. Dkt. #6765, Consent order, January 12, 1959).

The Federal Trade Commission approved an order requiring 14 New York and New England jobbers of automobile replacement parts and their buying organization, Six-State Associates, Newton, Mass., to stop soliciting and accepting illegal price advantages from suppliers.

In taking this action, the Commission adopted an initial decision by Hearing Examiner Frank Hier based on an order agreed to by the respondents and the F. T. C.'s Bureau of Litigation.

In its complaint of April 5, 1957, the F. T. C. charged the respondents with knowingly inducing favored prices in violation of Section 2(f) of the Robinson-Patman Amendment to the Clayton Act.

Although the jobbers' purchases are billed and paid through the purchasing organization, the complaint alleged, it is not the purchaser as purported, but is merely a bookkeeping device to facilitate the price discriminations.

The complaint charged that the jobbers use their combined bargaining power to demand special prices, discounts, allowances, rebates, and selling terms, and replace suppliers who refuse to accede.

For example, the complaint said, suppliers must consider the jobber-members' purchases in the aggregate when granting quantity purchase discounts, allowances, or rebates to each of them.

The order forbids the respondents to induce or accept a net price they know is lower than that which the supplier charges other customers, where (1) the seller competes for their business with others, and (2) they compete with other customers of the seller. In determining "net price," discounts, rebates, allowances, deductions or other selling conditions affecting net price must be taken into account.

F. T. C. v. ***Independent Salmon Canneries, Inc.*** (F. T. C. Dkt. #7201, Init. Decision, January 12, 1959).

An order issued by a Federal Trade Commission hearing examiner would require Independent Salmon Canneries, Inc., Seattle, Wash., to stop favoring customers with illegal brokerage payments.

The concern, Examiner Loren H. Laughlin said, not only sells its own pack of seafood but acts as primary broker for other packers, generally through field brokers. Its customary brokerage fee is 5%, which usually is split with the field broker.

In both capacities, the examiner found, the company has granted certain buyers substantial discounts or allowances in lieu of brokerage or price concessions reflecting brokerage. These practices violate Section 2(c) of the Robinson-Patman Amendment to the Clayton Act, which forbids sellers to pay brokerage to buyers purchasing for their own account for resale, he ruled.

Ordering the unlawful payments stopped, Examiner Laughlin stated these typical means were used to make them: (1) allowing favored buyers, or their agents, price reductions off-set wholly or partly by cutting the field broker's commission, and (2) granting price concessions reflecting brokerage where brokers were not utilized.

F. T. C. v. *Nelbro Packing Co.* (F. T. C. Dkt. #7209, Consent order, January 12, 1959).

The Federal Trade Commission approved a consent order prohibiting Nelbro Packing Co., Seattle, Wash., from granting customers illegal discounts in lieu of brokerage.

The Commission adopted an initial decision by Hearing Examiner Loren H. Laughlin containing an order agreed to by the company and the F. T. C.'s Bureau of Investigation.

A Commission complaint, issued July 23, had charged that Nelbro made a substantial number of sales direct to "at least one" large chain at a lower net price reflecting the 5% brokerage normally paid to brokers for negotiating Nelbro's sales. Section 2(c) of the Robinson-Patman Amendment to the Clayton Act prohibits paying or granting to buyers for their own account a discount or allowance in lieu of brokerage.

Nelbro, a distributor of canned salmon, is a wholly-owned subsidiary of Nelson Bros. Fisheries Ltd., a Canadian corporation located at Vancouver, the complaint stated.

The order prohibits these illegal payments in the future.

NOTES

I. *Department of Justice Activity*

1. Court Rules for Seven West Coast Oil Companies

A federal district judge has refused to order the seven major West Coast oil companies to divest themselves of their retailing operations.

This antitrust suit, which was initiated in 1950, was to be used as a model for similar divestiture suits by the government. The present ruling was made after the pretrial hearings. The judge said that case injunctions would be sufficient to prevent restraints of trade and that divestiture would cause a severe economic upset.

If the government wishes to continue the suit it will have to let the case go to trial and then appeal to the Supreme Court. According to the ruling, even if the government's charges are upheld divestiture will not be necessary. The company policies on which the case was based were in existence prior to 1950 and have since been changed.

2. Arapahoe Case Being Appealed

The Justice Department is appealing to the Supreme Court for reversal of last Spring's Federal District Court decision clearing three pipelines of charges of paying excessive dividends.

The D.J. contention was that the pipelines—Arapahoe Pipe Line Co., Service Pipe Line Co., and Tidal Pipe Line Co.—are paying their parent companies dividends computed on a valuation base which includes the value of property used but not owned by the lines. The Justice Department claims these dividends exceed the 7 per cent limit established by the Elkins consent decree.

3. Price-Fixing Charged in Sale of Office Furniture

A federal grand jury in San Francisco indicted the Hunting-Roberts Company of Los Angeles for conspiring with its dealers in the sale and distribution of metal office furniture.

The defendants were charged with a conspiracy to fix uniform resale prices and discounts and to allocate and control bids submitted to government agencies. The indictment claimed that defendants' sales in California, Utah, Arizona and Nevada were about $5,000,000 annually.

4. Motion Picture Exhibitor Awarded Damages

In an antitrust suit in the Court of Appeals for the Ninth Circuit, a previous decision awarding damages of $20,000, to be trebled, and attorney's fees of $10,000 was affirmed. (*Fox West Coast Theatres Corp.* v. *Paradise Theatre Building Corp.*)

The motion picture distributors, Fox West Coast Theatres Corp., Twentieth Century-Fox Film Corp. and Loew's Inc., had been found by a jury to have conspired to deny Paradise, a motion picture exhibitor, the right to show films on a non-exclusive seven-day run without bidding against other theatres in the general area. The

defendants had all refused Paradise's demand but claimed there was no conscious parallelism of action due to their divergent reasons for such conduct.

Although the Court of Appeals held that each distributor had the right to refuse such a license they must do so independently to remain within the law. The Court of Appeals did not rule on whether there was a conspiracy but found that the trial court jury had ample grounds for such a finding.

5. Auto Dealers Plead Guilty

Fourteen Washington, D. C. Chevrolet dealers and their trade association pleaded guilty to price-fixing charges. Thirteen dealers were fined $2,000 each, one paid $1,000 and the dealers' association was fined $5,000.

The indictment charged the dealers with a conspiracy to fix the list prices on Chevrolets higher than the manufacturer's suggested price.

Similar charges against the Washington Ford and Oldsmobile dealers are still pending as are suits in Northern California against Plymouth, Ford and Chevrolet dealers.

6. Price-Fixing Indictment

The Fur Shearers Guild, Inc. of New York and six individuals were indicted in the U. S. District Court for alleged illegal restraints in the sale of their services. A civil complaint was also filed.

The Guild is composed of six concerns that do almost all of the fur shearing in the United States, a business which grosses about $20 million a year.

The Department of Justice is asking for the dissolution of the Guild and for injunctive relief against the alleged price-fixing activities and exclusive dealing contracts of the defendants. These contracts bind their purchasers to obtain fur shearing services from Guild members only.

7. U. S.-Canadian Radio and TV Trade

The Justice Department charged the General Electric Co., Westinghouse Electric Corp. and a leading Dutch electronic manu-

facturer with an illegal conspiracy to restrain trade in the sale of U. S.-made radio and TV sets in Canada.

According to the complaint the defendants' Canadian subsidiaries control a patent pool which prevents other U. S. manufacturers from exporting these items to Canada. In order to enter this market, American radio and TV manufacturers have been forced to set up production facilities in Canada.

The government is seeking injunctive relief against this "private territorial allocation."

8. Record Number of Antitrust Suits

The number of private antitrust suits filed during fiscal year 1958 was greater than in any preceding year, according to the Annual Report of the Director of the Administrative Office of the United States Courts.

In 1958 the number of such suits increased 44 per cent over those in 1957 (188 in 1957 to 270 in 1958).

The volume of government and private antitrust suits combined that were filed in the district courts in 1958 was almost three times the number initiated in 1948. 325 such suits were filed in 1958, more than in any of the previous 16 years covered in the report.

II. *Consent Decrees*

1. Price-Fixing Case Against Gummed Industries Association

The Gummed Industries Association, Inc., New York, signed an F. T. C. consent order concerning a conspiracy to fix prices for flat gummed paper.

The six respondents, Dennison Manufacturing Co., Nashua Corp., Ludlow Papers, Inc., The Brown-Bridge Mills, Inc., The Gummed Products Co., and Paper Manufacturers Co., were named in a complaint last March along with Minnesota Mining and Manufacturing Co. According to the Commission these seven account for virtually all of the nation's output of flat gummed paper. Minnesota Mining has filed a motion asking for dismissal of the complaint on the grounds that the challenged activities were committed by a former subsidiary.

The defendants were charged with fixing identical prices and terms of sale, exchanging information through the Association, estab-

lishing uniform delivered prices in each of four zones which divided the United States into selling areas, and fixing price differentials for variations in color, size, quantity, etc.

2. R. C. A. Suit Settled

Both the civil and criminal antitrust actions against R. C. A. have been settled; the outcome of the criminal suit was a fine of $100,000. R. C. A. did not contest the suit, and the civil suit ended with a consent judgment that frees 12,000 of its radio and TV patents to all comers.

By settling the suit, which charged R. C. A. with deliberately monopolizing research and patents in radio and television, transcripts of evidence which could have been used in future treble damage suits were kept out of open court. R. C. A. is still facing a $150 million treble damage suit by the Philco Corp.

The decree requires R. C. A. to license all its radio and black-and-white TV patents free to the rest of the industry. Also required is that its color TV patents be placed in a pool and licensed free to any pool member, that all new patents for the next 10 years be licensed at a reasonable fee, and that licensees be permitted to subscribe to only those patents they want rather than the "package license" deal previously used.

Royalty income to R. C. A. from 1952 to 1956 amounted to $96 million. Since R. C. A. had stopped demanding royalty payments on its radio and black-and-white TV patents a year ago the free licensing demanded in the decree will not have any immediate effect on the industry.

3. Order Signed in Price Discrimination Suit

A consent order was signed by the Thermoid Company of Trenton, N. J., manufacturer of automobile replacement parts, requiring that company to stop discriminating in price among its customers.

According to the complaint, Thermoid had favored its private brand customers over group buying organizations and had charged still higher prices to its independent jobbers.

Thermoid, with sales of $40 million a year, has agreed to charge the same net prices to customers who compete with each other.

4. Brewing Company Merger Case Closed

A consent judgment has terminated the government's suit against the Lucky Lager Brewing Company of San Francisco. Lucky Lager acquired the Fisher Brewing Company of Salt Lake City, allegedly in violation of Section 7 of the Clayton Act.

The complaint charged that the Fisher Company had 62 per cent of Utah's beer production capacity and accounted for 39 per cent of the total volume of beer sold in that State. It was also charged that Lucky Lager was, in 1956, the largest seller of beer in the West and the twelfth largest in the United States, and that it accounted for approximately 12 per cent of beer sales, by volume, in Utah. The combined sales of the two companies in Utah was approximately 51 per cent.

The judgment requires Lucky Lager to divest itself of the business and assets of Fisher and permanently enjoins the former from acquiring any interest in any Utah brewery.

5. Electric Shaver Manufacturers Sign Consent Decree

Three manufacturers of electric shavers signed F. T. C. consent orders which settled the price discrimination complaints leveled against them.

Schick, Sperry Rand, and North American Philips Company were accused of selling to direct purchasers at lower prices than those charged to competitors who bought from the manufacturers' wholesalers. The three producers agreed to discontinue this practice.

In addition, Schick agreed to refrain from the use of allegedly misleading "free" claims in its advertising; Schick and North American agreed to furnish demonstrator services to their customers on a proportionately equal basis; and Schick and Sperry Rand agreed not to fix the prices at which independent outlets sell shavers in competition with company outlets.

6. Philadelphia Stations Sign Decree

A consent decree was signed by the Philadelphia Radio & Television Broadcasters Association and nine Philadelphia radio stations. This brought to an end a federal antitrust suit which charged the stations with agreeing to maintain rates on commercial time.

The trade association was dissolved and the stations were enjoined from agreeing not to compete on advertising rates.

7. Jewelry Chain Signs Consent Order

Associated Barr Stores, Inc., a large Philadelphia jewelry chain, signed an F. T. C. consent order requiring it to stop knowingly inducing discriminatory advertising allowances from its suppliers.

The chain had been accused, in a complaint issued last spring, of inducing Keystone Manufacturing Co. and Keystone Camera Co. of Boston, to grant advertising allowances which "they knew or should have known" were not offered on proportionally equal terms to their competitors.

In the complaint the Commission charged Barr with using an unfair method of competition prohibited by Section 5 of the F. T. C. Act.

In an initial decision the Keystone companies were found to have violated Section 2(d) of the Robinson-Patman Amendment by failing to make proportionate payments available to buyers competing with Barr. Keystone is appealing this decision.

8. Schine Theaters Must Pay Fines

The Supreme Court has refused to review a lower court decision imposing $73,000 in fines on the Schine Theaters.

A 1949 consent decree required the theater chain to divest itself of 33 motion picture theaters. The Justice Department alleged that Schine sold only seven of these from the time of the 1949 decree to the 1954 contempt conviction. The lower court imposed the fines because Schine "willfully and contumaciously" ignored the consent order.

III. *F. T. C. Complaints*

1. Construction Publications Charged

The Federal Trade Commission issued a complaint against Associated Construction Publications, Detroit, Michigan, and its 15 member publishers of construction industry trade papers.

According to the complaint the Association was organized and used for purposes of allocating circulation territory and diverting advertising from competitors. It was further charged that the member

firms agreed upon prices, discounts and terms of sale for advertising space in their respective publications. The members are allegedly responsible for 90 per cent of the advertising placed in the area although there are 35 regional construction publications.

The Commission charges that the group violated Section 5 of the F. T. C. Act by injuring competitors and impeding the establishment and development of new trade papers.

IV. *Mergers*

1. Brillo Cleared in Merger Case

Charges that Brillo Manufacturing Company, N. Y., violated Section 7 of the Clayton Act by acquiring the Williams Company, Ohio, were dismissed for failure of proof by Hearing Examiner Robert L. Piper.

The New York steel wool manufacturer had previously made a motion to have the complaint dismissed. The hearing examiner, dividing the relevant market into two parts, household and industrial, had agreed to dismiss charges with regard to the former but not the latter. This decision was reversed by the Commission which remanded the case to the examiner. The Commission disagreed with the examiner's ruling that Brillo's acquisition automatically established a reasonable probability of lessening competition in the industrial steel wool market. The examiner so ruled because the merger would increase the company's share of that market from 29 per cent to better than 47 per cent.

In the Commission's opinion, factors supplemental to market share must be examined before a Section 7 violation is found. "... likewise important is such evidence as was received herein pertaining to the general competitive situation, number of competitors and degree of concentration prevailing in the industry."

The examiner had also ruled that competition in the household steel wool market could not be lessened by Brillo's acquisition because substantial competition did not previously exist between the two companies. (In 1954, Brillo had a 45.3 per cent share of this market and Williams had 0.3 per cent.) The Commission disagreed with this ruling because other relevant market information, "... including post-acquisition production and marketing data" should have been considered.

In view of the criteria the Commission suggested in reversing the initial decision the hearing examiner ruled that "the record fails to establish that the effect on the acquisition may be substantially to lessen competition or to tend to create a monopoly in violation of [section] 7." Although Brillo is the largest producer of industrial steel wool, the examiner ruled it is not, as the complaint alleged, the "dominant" producer, using the dictionary definitions, "ruling" or "controlling." The basis for this conclusion is that Brillo has not (1) exercised price leadership, (2) depressed prices unduly, (3) tried to keep for itself markets for new uses of steel wool, or (4) used different pricing practices than competitors on government-bid business.

2. Bethlehem-Youngstown Merger Blocked

The proposed merger of the steel industry's second and sixth largest producers was ruled against by Federal Judge Edward Weinfeld.

According to Judge Weinfeld, "The proposed merger runs afoul of the prohibitions of the Clayton Act in so many directions that to permit it is to render Section 7 of the Act sterile . . . To say that the elimination of Youngstown would not result in a significant reduction in the vigor of competition in the steel industry, is, in the light of its history, to disregard experience . . . "

The Judge stated emphatically that the merger would eliminate competition between the two companies and would also "eliminate Youngstown as a vital source of supply for independent fabricators who compete with Bethlehem in the sale of certain steel products . . . would eliminate Youngstown as a substantial buyer of fabricated steel . . . and would eliminate a substantial independent alternative source of supply for all steel consumers." No decision has yet been reached concerning appeal to the Supreme Court.

3. Anheuser-Busch Acquisition

An antitrust suit has been filed by the Justice Department against the Anheuser-Busch brewing company in an effort to divest it of the Regal Brewery purchased last February.

According to the complaint, Anheuser-Busch's Florida sales increased by 12 per cent to a total of 33 per cent of the State's beer sales as a result of the acquisition. The Department of Justice main-

tains that the effect of the purchase may be to substantially lessen competition; however, the Regal Brewery claims that competition during the past year has increased, not decreased.

4. Anti-Merger Suits Dwindling

The Justice Department is concentrating on price-fixing complaints and the F. T. C. on deceptive advertising. Only two anti-merger complaints have been filed by the F. T. C. this year compared with six last year and twelve in 1956.

The Justice Department is fulfilling its promise of concentrating on more consumer-type suits, such as price-fixing charges.

F. T. C. Chief Gwynne has explained that this decline in the mergers under attack is due to the decline in the merger rate caused by the recession; economic recovery could reverse this trend. The accusation by Congress that the F. T. C. has been letting misleading ads go unchecked is undoubtedly another reason for this shift.

V. *Small Business Failures*

According to Dun & Bradstreet, small business failures increased by 11 per cent in the first three-quarters of 1958 compared with the same period of 1957, 11,490 against 10,346.

It was also noted that the dollar liabilities of these firms increased 20.8 per cent over the same period, from $469,641,000 in the first three-quarters of 1957 to $567,203,000 in the comparable 1958 period. However, in both the number of failures and the liabilities the 1958 third-quarter totals were substantially lower than in the first and second quarters.

VI. *Report on the Auto Industry*

A report by the majority of the Senate Antitrust Subcommittee urged the Justice Department to consider attempting to break up General Motors Corporation.

Senator Dirkson dissented from the majority's report on administered prices in the auto industry, stating that the industry was free of monopolistic tendencies.

The industry was attacked in the majority report on its policies of pricing, advertising, styling and distribution. The majority contends that concentration in the industry is increasing and that prices are "administered" by General Motors and followed by the other

producers with the result that no price competition exists among the big three.

Attorney General William P. Rogers announced February 3, 1959 that he had forwarded identical letters to the Speaker of the House and the Vice President, as Presiding Officer of the Senate, recommending enactment of a three point program to strengthen the antitrust laws.

Drafts of the proposed legislation accompanied the letters. The suggested statutes would: (1) give the Department of Justice authority to compel the production of documents during the investigative stage of civil antitrust proceedings; (2) amend the Clayton Act by requiring prior notification be made of corporate mergers and acquisitions where the capital involved would be in excess of $10,000,000; and (3) amend Section 7 of the Clayton Act to prohibit banks and similar groups from acquiring the assets of other banks when the effect may be substantially to lessen competition, or to tend to create a monopoly.

The full text of the letter to the Vice President is as follows:

The Speaker
House of Representatives
Washington, D. C.

Dear Mr. Speaker:

I enclose for your consideration and appropriate reference a three point legislative program designed to strengthen the antitrust laws and their enforcement.

The first of these proposals is a suggested "Antitrust Civil Process Act of 1959," which will give to the Department of Justice much needed authority to compel the production of documents during the investigative or pre-complaint stage of civil antitrust proceedings. As I said in my letter of last August 12, when I forwarded this proposal for possible staff study following the adjournment of the 85th Congress:

> Effective antitrust enforcement requires full and comprehensive investigation before formal proceedings, either civil or criminal, are commenced. Yet, under existing law the Department has no authority to compel the production of documents during the investigative or pre-complaint stage of civil antitrust proceedings. When criminal proceedings are contemplated, of

course, the grand jury process adequately enables the Department to effect the production of both documentary and oral evidence from non-cooperative organizations. However, when only civil proceedings are indicated, the Department is completely dependent on voluntary cooperation in the investigative stage—and that is not always forthcoming. The grand jury procedure is considered to be improper in such cases and, of course, is never available with respect to mergers under Section 7 of the Clayton Act since no crime is involved in such instances. Charges of monopolization or illegal merger are most often brought on the civil side. In such cases, then, the Department must presently rely on the cooperation of prospective defendants either to give it the detailed information, or to permit access to their files to search for information indispensable to an accurate analysis of the situation in question. The proposed bill would end our dependence on such voluntary cooperation.

A second major proposal warranting early Congressional consideration is one requiring that the Department of Justice and the Federal Trade Commission (or the appropriate commission or board vested with jurisdiction) be advised in advance of merger plans involving corporations having a combined capital structure in excess of $10,000,000. This dollar limitation eliminates any potential burden upon small business, while the measure provides a useful tool to enable the government to learn of and evaluate proposed mergers which may have a significant effect upon the national economy. This bill will ease a most difficult investigative burden, and at the same time afford a more even-handed enforcement of Section 7 of the Clayton Act, relating to mergers. I should like to emphasize that the measure does not contemplate the barring of mergers by virtue of executive branch disapproval of merger plans. It does, however, permit the government to evaluate the effect of a proposed merger on competition, and to indicate, for consideration by the companies involved, whether the government will interpose objection in the courts. This should be of mutual benefit to business organizations and to the government.

The third enclosed legislative proposal would amend Section 7 of the Clayton Act, which section now generally prohibits corporations from acquiring either the stock or the assets of other corpo-

rations when such acquisition would substantially lessen competition or tend to create a monopoly. In so far as banks are concerned, the section now reaches only mergers by virtue of stock acquisitions. Because increasingly large numbers of bank mergers are effectuated through asset acquisitions which may have serious anticompetitive effects, it seems most desirable that such mergers be brought within the scope of Section 7.

Your particular attention is directed to page 53 of the Economic Report of the President, transmitted to the Congress on January 20, 1959 (H. Doc. 28, 86th Cong.), in which the three legislative proposals above described were recommended among improvements in our antitrust laws which would enhance the vigorous competition on which the "vitality of our economic system depends in large part."

The Bureau of the Budget has advised that there is no objection to the submission of these recommendations.

Sincerely,

Attorney General

BOOK REVIEWS

Chamberlin, Edward H., "The Economic Analysis of Labor Union Power," pp. 48 in *Labor Unions and Public Policy*, American Enterprise Association (1958), pp. 177, $4.50.

This essay is one of four studies* published by the American Enterprise Association with the objective of promoting "an intelligent public policy to deal with the rapid growth of labor union power . . . "

Chamberlin's contribution to this volume is largely a review of the sins of labor unions. Essentially he adds his voice and prestige to what is becoming a roaring demand for recognition by the public of the consequences of union power and for legislation by Congress to curb this power. His conclusion that "the public interest requires the imposition of major restrictions on the monopoly power of labor" would, I believe, find considerable support among economists.

One would not expect an essay sponsored by the American Enterprise Association to be "pro-union" but Chamberlin has carefully

* The other studies are: Bradley, Philip D., "Involuntary Participation in Unionism"; Reilly, Gerard D., "States Rights and the Law of Labor Relations"; and Pound, Roscoe, "Legal Immunities of Labor Unions."

distinguished between "good" union practices (e.g. the participation by workers in negotiating the rules and procedures under which they work) and the whole gamut of "bad" union practices that come under the heading of "labor monopoly." To be sure, "bad" union practices command most of Chamberlin's attention and he discusses, within the framework of economic analysis, such issues as wage-push inflation, union shop versus right-to-work laws, restraint of trade by unions in product and labor markets, strikes, boycotts, racketeering, etc.

Further, there are interesting sections on the origin of our pro-union intellectual heritage (he blames the classical economists) and on the inadequacies of the economic theory of labor markets (he states the case for the application of monopolistic competition techniques to labor market analysis).

I find the essay deficient in its failure to cite the growing body of empirical evidence concerning the economic impact of unionization. Chamberlin states that "there is abundant evidence that unions today do have too much economic power," but the reader does not get the opportunity to assess this evidence. The essay, however, is a timely reminder by a respected economic theorist that labor unions have thus far escaped the same kind of public control that has been imposed upon companies.

MELVIN LURIE
University of Connecticut

Antitrust and American Business Abroad, by Kingman Brewster, Jr., pp. xxiv, 509, McGraw-Hill Book Company, Inc. (1958), $12.00.

The writing of a comprehensive treatise on a major segment of the antitrust laws must be one of the most exacting tasks a legal scholar can undertake. Antitrust decisions often defy facile analysis. Few courts in cases of any complexity set out and discuss in their opinions the legal significance of more than a small part of all the facts on which they rely in reaching their decisions; even fewer seem to confine their legal conclusions to the facts of the case before them. A further difficulty arises from the breadth of the demand that the subject makes on the writer: to undertake an over-all evaluation of what the courts do and say, the writer must have a grounding

in economics at least comparable to his legal training. Finally, a study cannot be truly comprehensive unless it includes some inquiry into the effect of the law on the business community's day-to-day planning and operations. Such an undertaking would seem beyond the resources of most scholars.

The extent to which Professor Brewster's book has overcome these difficulties is probably a tribute both to the author and to the organization which sponsored his work. About five years ago a special Committee of The Association of the Bar of the City of New York invited the author, who is professor of law at the Harvard Law School, to direct a comprehensive study of the application of our antitrust laws to foreign commerce. The purpose of the study was, as stated by Professor Brewster:

> to fill a widely recognized need for an analysis of the law, an inquiry into the realities of the law's impact on business, and an appraisal of the effects of our antitrust policy on our relations with other nations.[1]

Through the good offices of members of the sponsoring Committee and a financial grant from the Merill Foundation, Professor Brewster and his staff were able to complement their legal researches by conducting discussions on the impact of the law on foreign transactions with many firms and their counsel. The Committee, all of whose members are experienced in matters of antitrust or foreign policy, further appears to have acted as a continuing sounding board for the author's ideas and analyses. These efforts have produced a surprisingly well-balanced book, in which the author combines imaginative and even daring conceptions with a cautious and realistic approach to his subject.

Apparently projecting the three-fold objectives of his study into the organization of the book, Professor Brewster divides his material into three sections. The first section contains a brief outline of the legislative history of the Sherman Act as it bears on foreign trade and surveys the conflicts that have arisen between the United States and foreign nations over attempts to enforce the antitrust laws against foreign concerns and interests. The author establishes a framework for the subsequent discussions by examining the jurisdic-

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[1] P. vii.

tional limits of the antitrust laws, both personal and legislative. The section concludes with a review of "antitrust concepts" applied by the courts in cases involving foreign commerce. In the second section Professor Brewster turns to an examination of the impact of the law on specific business arrangements. Starting "with the transaction rather than with the law," [2] Professor Brewster surveys the antitrust implications of joint export arrangements, various types of patent, know-how, and trademark licenses, and the holding of managerial interests by American firms in foreign enterprises. Next the author reviews sanctions and remedies afforded under the antitrust laws. He concludes the section with a chapter, based on the discussions conducted by the author and his staff, on the role of antitrust considerations in business decisions. In the third section Professor Brewster reverts to a more general analysis of the questions raised in the preceding sections. He discusses possible legal bases for the "extraterritorial" jurisdiction of the antitrust laws and investigates the need and prospects for changes both in the substance and the administration of the antitrust laws. The author examines in particular the alternatives offered through administrative rule-making, clearances, and exemptions, and a reallocation within the government of responsibilities for enforcing and defining the law. At the end of this section are set out the author's own conclusions and recommendations.[3]

The author's task of analyzing the law is complicated, rather than simplified, by the relative fewness of the foreign commerce cases, which, if confined to their facts as found by the trial courts, are, in Professor Brewster's opinion:

> relatively "easy" cases in the sense that they involved rather far-reaching and powerful agreements and combinations which demonstrably and intentionally affected the United States or its foreign trade.[4]

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[2] P. 100.

[3] Included as part of the book are three monographs by other authors: *The International Reach of American Regulatory Legislation Other Than the Sherman Act*, by Donald Trautman; *The Foreign Aid Programs and the United States Government's Antitrust Policy*, by Steuart L. Pittman; and *Problems of Foreign Discovery*, by David G. Gill.

[4] P. 99.

Lacking direct precedent, the author is repeatedly forced "to go out on a limb, crawling by analysis and analogy."[5] He displays considerable agility in this undertaking, bringing a wide range of domestic commerce cases to bear on his subject. Since much of the domestic precedent on which he relies is itself in a confused and uncertain state, Professor Brewster extends his critical analysis to many principles that find their application rather more frequently at home than abroad. These discussions should prove of interest even to practitioners not primarily concerned with the application of the antitrust laws to foreign trade.

The limited reach of the foreign commerce cases also gives the author considerable latitude in developing his own theories. Professor Brewster deals at some length with the possibility of sustaining loose agreements by reason of special business justifications arising out of the circumstances and necessities of foreign trade. Despite the unsympathetic reception accorded such justifications by the majority of the Supreme Court in *Timken*,[6] and the rather limited ground of necessity conceded in *Minnesota Mining*,[7] Professor Brewster suggests that such justifications might be given greatly increased consideration by the courts, at least in cases where the relationship between a firm's trade problems and the corrective measures it has adopted is closer than it was in *Timken* and *Minnesota Mining*.

Another ground for modifying the impact of the antitrust laws on foreign trade stems from the assumption of the author that our antitrust laws have no concern unless American consumers are hurt or the business opportunities of Americans to engage in foreign trade are frustrated. Professor Brewster indicates that in many situations, as in the case of the "foreclosure" of part of a foreign market, recognition of this proposition logically leads to the development of substantially different standards of legality than would be applied by the courts in passing on a similar foreclosure of a share of the domestic market.

Taken as a whole, Professor Brewster's analysis reflects considerable optimism as to the prospect of accommodating the antitrust

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5 P. 100.

6 *United States* v. *Timken Roller Bearing Co.*, 341 U. S. 593 (1951).

7 *United States* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

laws to the realities of doing business abroad without departing from general principles developed in the context of domestic commerce. It is possible, the author suggests, to find sufficient play within the present framework of the law to satisfy many of the special requirements of foreign trade. The author evidently is not in agreement with the school of thought which holds that such an accommodation cannot be made without extensive legislative revision of the antitrust laws. On the other hand, Professor Brewster recognizes that the restrictive impact of the law must be measured as much by the transactions it discourages as by those it forbids. Assurances based on abstract reasoning cannot always satisfy businesses faced with the prospect of sinking large sums into foreign ventures. Significantly, one of the conclusions the author derives from his discussions with firms and their counsel is that:

> the areas where our own analysis was least certain—the ancillary restraint, the acquisition, and the joint venture—were the areas where the antitrust seemed to cloud the investor's horizon and dampen his initiative even if it could not be singled out as *the* decisive negative factor.[8]

In his conclusions and recommendations (which are the author's own, and not those of the sponsoring Committee) Professor Brewster tries to resolve this impasse. He advocates greater liaison between the prosecuting agencies of the government and the Department of State, and recommends that both courts and prosecutors give greater consideration, in exercising their respective functions, to the factors that differentiate foreign from domestic trade. Professor Brewster also urges the Department of Justice to declare, without waiting for judicial pronouncement, that restraints attached to a license or to an acquisition of or joint venture with competitors should not be held *per se* illegal. By way of legislation, the author advocates empowering the President to grant antitrust exemptions where "essential to the national security of the United States." The author would, however, condition the granting of such exemptions upon consultation with the National Security Council to assure that the power to exempt will "be reserved for rare matters of highest priority."[9]

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[8] P. 275.

[9] P. 457.

Certainly the interpretation accorded to "national security" in other economic contexts, as in connection with recent applications of the Buy American Act,[10] lends little encouragement to the view that, absent some built-in administrative check, the exercise of such a power would be so limited.

The necessity of keeping the discussion within manageable bounds must have imposed many hard decisions on the author not to pursue all possible comparisons to domestic commerce cases. On occasion, it seemed to this reviewer, Professor Brewster may have drawn his lines too closely. Thus in discussing whether or not an American firm may license a foreign firm under its unpatented know-how or trademarks on the condition that the licensee refrain from manufacturing products other than those specified by the licensor, Professor Brewster acknowledges the analogy presented by domestic cases involving patent licenses containing similar restrictions, but does not further deal with them. In fact, at least one of the grounds adverted to by the author as a possible justification for restrictive covenants of the kind involved here has been advanced, and rejected, in such a case.[11] While this omission does not impugn the author's conclusion that a licensor "is probably better advised not to attempt complete exclusion of the licensee from a product line,"[12] it may erroneously lead the reader to suppose that there is no authority bearing on the question.

Professor Brewster's book is not a primer. Except in a chapter entitled "The Scope and Limits of Antitrust Jurisdiction," the author does not recite at length either the facts of the foreign commerce cases or the courts' opinions. For the practitioner not familiar with these cases Mr. Fugate's recently published book on the same subject, *Foreign Commerce and the Anti-trust Laws*,[13] may be recommended as preliminary reading. While Professor Brewster draws extensively on judicial authorities, and often develops particular aspects of a

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10 See New York Times, Jan. 21, 1954, p. 11, c. 5.

11 See *Park-In Theatres, Inc.* v. *Paramount-Richards Theatres, Inc.*, 81 F. Supp. 466, 472 (D. Del. 1948), 90 F. Supp. 730 (D. Del. 1950), aff'd, 185 F. 2d 407 (3d Cir. 1950), cert. den., 341 U. S. 950 (1951). See also: *McCullough* v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), cert. den., 335 U. S. 813 (1948); *National Lockwasher Co.* v. *George K. Garrett Co.*, 137 F. 2d 255 (3d Cir. 1943).

12 P. 166.

13 Pp. xxiii, 384. Little, Brown & Co. 1958. $16.00.

decision in the course of his discussion, the emphasis of his book is on investigating areas left unsettled or untouched by the decided cases. To that task the author has brought a remarkable critical intelligence. The penetrating and painstaking analysis to which the author subjects the concepts of the antitrust law and the many stimulating ideas and suggestions he throws out in the process make this book an eventful contribution to antitrust literature.

HELMUT F. FURTH*

PROPOSALS

AN EDUCATIONAL PROPOSAL

Increasingly it becomes apparent that the form and method of education is not adequate. This is not only a matter of schools, universities and teachers. The traditional idea that a set period of academic training will suffice to educate us to the nature of the social and physical universe in which we live, or to the knowledge most relevant to our tasks and our careers, is increasingly a delusion. No set period of training, no matter how excellent it is, can suffice, for all that we have thereby acquired becomes too rapidly obsolete. Ideas and institutions, conceptualization and fact, are in such a state of flux and evolution, that any static image is left quickly behind. We, meanwhile, burrow deep and deeper into the minutiae of our task as lawyer, as doctor, as engineer, as executive, as teacher, becoming experts, knowing very much about very little, digesting mountains of dross for the sake of the grain of genuine advance. We become masters of our craft. But of the world beyond? It takes new forms and shapes, and drifts beyond our grasp. We don't want this to happen. But alas we have no method of seeking selectively and deeply and quickly beyond the community of our work and the orbit of our expertese, for that which is relevant to our needs and meaningful to our interests. We scan the *Times*. We glance through *Business Week*. We read an article in *The Reporter* or in *Fortune*. But no amount of newspaper scanning and article reading suffices

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for the process of education. And precisely what is required is a dynamic process of education that will relate into the general image we have of nature and society the salient elements of a perpetually changing structure of outlook and idea, of conception and forms of organization, of cumulated experience and of pending problem. So that our education can be kept up to date we need a method for the dynamic reshaping of our image of the whole in the face of complex, rapid, and ceaseless change. No such method is available for most of us.

Similarly inadequate is our method for intermingling and interrelating the diversity of our experience and ideas. Our techniques of communication do not suffice. Nor is communication a matter of simply talking or writing to each other, as individuals. It is not the saying, but how to say and to what purpose. It is a function of customs, habits, mores, institutions; like education, communication is a social method slowly and painfully developed through history. In one sense this method has leaped forward. Electronic devices now enable the single message to be multiplied manifold. But the civilized art of communication, communication as dialogue between man and man, communication as the lines and channels that unify the diversities of individual experience into the cultural unity, has regressed. We talk shop or we talk trivia, but talking is no longer the means of contributing to, or partaking in the common enlightenment. The virtue of the city is that it is the place where many streams can meet. In the modern metropolis there are many streams, but they do not meet. They do not mingle; the virtue of their multiplicity is lost. Each of the divisions of the human task grows to such a magnitude that the individual is sealed into its self-sufficiency and lost in its complexity. These failures, to educate, to communicate, are a part of a single failure, of a single lack.

In the context of this large indictment, our proposal will seem very small. It might at least be a step, though humble and experimental, towards developing a method of education and communication for those who are already trained, responsible, expert—and yet who would seek to integrate continually the salient growth of knowledge and concept into the framework of their own understanding. We are suggesting a self-organized seminar (or a system

of many seminars, but each) consisting of no more than twenty men whose membership would be screened and selected to insure that a full diversity of professional, business, technical and scientific experience is represented, and so that only those are brought into the group who have a positive contribution to make to each other. A high level educator, a university professor presumably, would lead the seminar. His would be a professional task, as secretary, teacher, planner, organizer, discussion leader. The seminar would fix its own agenda. What kind of problems would it pick? If I were to make such a selection, these would be on my list "ICBM and World Power" "What Happened to Atomic Energy" "The Organization of Scientific Research in Business and Government" "Changing Concept of Monopoly" "Reform of the Patent System" "Impact and Potential of Electronic Devices" "Change and Growth in Russia and China" "Controlling Depression *and* Inflation" "The Professional Psychologist in the Business Organization" "The State of Psychiatry" "The Crisis of the City." Each of these topics transcends the orbit of the particular expert, and calls for a positive contribution from those who view the problem from diverse positions.

The seminar might meet fortnightly, starting in the late afternoon and going on through the evening. It would choose its own method of work, papers by its members, presentation by the seminar leader, or the arguments and views of outsiders who were invited to participate because of their special knowledge of the subject under discussion, and/or because of their special intellectual caliber. In all cases, the individual participants would probe and the group would discuss.

The seminar would neither be painless nor costless to the participants. Work and time would be required. The invited experts and the seminar leader would have to be paid. Depending on the quality of the seminar leader and the invited participants, costs might run to $500 (tax free) annually for each member of the seminar. But there would be a pay-off. The seminar would be the instrument of its members, used by them to find out that which they felt was significant and relevant to their needs and tasks. Further it would provide a permanent, working liaison between leading

persons advancing in diverse universes of endeavor, and as such would have value for the performance of public (and other) tasks beyond its own operations.

Such is the possibility. The question is whether there are those who would participate.

R. A. Solo

Proposed Congressional Legislation Relating to Trade Regulation, 1st Session, 86th Congress*

Sherman Act

Re "primacy of free enterprise"	Celler	H-82
Re National Fair Trade Act	Freidel	H-768
	Harris	H-1253[1]
Re promotion of quality and price stabilization	Boykin	H-2463[2]
Re provide notice before effectuating price increases	McGovern	H-4934

Clayton Act

Damages in Robinson-Patman cases	Sparkman	S-725
Robinson-Patman Act an "antitrust law"	Patman	H-212
	Ashley	H-4350
Recovery of actual costs in private actions for injunctions	Long	S-311
Damages discretionary with the court	Walter	H-1184

* Unless otherwise indicated, all of the proposals have been referred to the Senate or House Judiciary Committee. No attempt has been made to include patent or FTC rule making proposals.

1 Referred to House Interstate & Foreign Commerce Committee.

2 *Ibid.*

Repeal of certain labor exemptions	Hiestand	H-378
Pro Sports:		
Baseball subject to limited exemption	Kefauver	S-886
" " " " "	Keating, Hennings and Dirksen	S-616
" " " " "	Whitener	H-2266
" " " " "	Walter	H-2370
" " " " "	Miller	H-2371
" " " " "	Harris	H-2372
" " " " "	Byrnes	H-2373
" " " " "	Cramer	H-2374
Pre-merger notification	O'Mahoney and Kefauver	S-442†
	Wiley	S-1005
	Celler	H-2325
	Robertson	S-1062[2a]
Bank acquisitions	Sparkman	S-724
	Wiley	S-1004
	Celler	H-4152
	Robertson	S-1062[2a]
To expedite finality of F. T. C. orders	Kefauver	S-714
	Sparkman and others	S-726†
	Roosevelt	H-432
	Broyhill	H-2977
Civil investigatory powers to Atty. Gen.	Kefauver	S-716
	Wiley	S-1003
Require filing of "evidentiary" brief by Justice	Long	S-310
Establish standards for government advisory groups	Celler	H-81
Pricing practices in relation to Clayton and F. T. C. Acts	Walter	H-1188

[2a] Referred to Senate Banking Committee.

† Approved by Antitrust and Monopoly Committee and reported to full Judiciary Committee on February 9, 1959.

Robinson-Patman Act

Robinson-Patman an "antitrust law"	Patman	H-212
	Ashley	H-4350
Damages, institution of action for	Sparkman	S-725
Re "good faith": (limiting defense) (complete defense)	Kefauver and others	S-11
	Capehart	S-138
Re mandatory functional discounts	O'Mahoney and Kennedy	S-31[illegible]
	Montoya	H-848
	Rogers (Colo.)	H-927
	Donohue	H-2528
	Osmers	H-2788
	Donohue	H-2868
Re applicability to sales to government for resale	Keogh	H-155
Re prohibition of price discrimination	Zablocki	H-1205
(so-called "Disclosure amendment")	Patman	H-2215
Re "equality of opportunity"	Patman	H-11
	Lesinski	H-384
	Rogers (Colo.)	H-929
	Johnson (Wisc.)	H-3654

Federal Trade Commission Act

National Fair Trade Act	Freidel	H-768
	Harris	H-1253[3]
To authorize exclusive dealing in Auto. Ind.	Multer	H-1026[4]
Pricing practices in relation to Clayton and F. T. C. Acts	Walter	H-1188
To promote quality and price stabilization	Boykin	H-2463[5]

[3] Referred to House Interstate and Foreign Commerce Committee

[4] *Ibid*

[5] *Ibid*

To prohibit certain practices by one who distributes at retail through own outlets as well as those of others	Bentley	H-2729[6]

Other Acts

Webb-Pomerene	Multer (Bars restricting foreign buyers)	H-582
Agric. Coop. Act of 2/18/22	Mason (Atty. Gen. to determine legality of prices)	H-200
Fish. Coop. Marketing Act	Pelly (Exemption from antitrust laws)	H-3348[7]
Federal Deposit Insurance Act	Celler (Safeguards against bank acquisitions)	H-4155[7a]

Miscellaneous

Nonrecognition of gain on distr. of stock per decree	Freer	S-200[8]
Advance notice of price increases by specified companies	O'Mahoney	S-215
Milk Coops., right to bargain collectively with purchasers	Aiken and Humphrey	S-753[9]
Restriction on auto. companies finance and insurance activities	O'Mahoney	S-838
	Kefauver and Hennings	S-839
	Celler	H-4256
To enable farmers to set production and marketing "goals" and prices "fair" to consumer and "profitable" to them	Marshall	H-838[10]

6 *Ibid.*
7 Referred to House Agriculture Committee.
7a Referred to House Banking and Currency Committee.
8 Referred to Senate Finance Committee.
9 Referred to Senate Agriculture and Forestry Committee.
10 Referred to House Agriculture Committee.

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